IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

RUSSO-CHINESE BANK, (a corporation) *Plaintiff in Error,* *vs.* NATIONAL BANK OF COMMERCE OF SEATTLE, WASHINGTON, (a corporation) *Defendant in Error.*	No. 2182

Brief for Defendant in Error

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SEATTLE, WASHINGTON.

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STATEMENT

The plaintiff seeks to recover from the defendant the sum of $38,412.19, with interest, being the return of the same amount of money paid to the defendant, the National Bank of Commerce by the plaintiff, the Russo-

Chinese Bank, in two payments, made respectively on November 9th, 1904 and December 29th, 1904.

According to the complaint the plaintiff proceeds upon two theories of the liability of the defendant to pay this money,—one theory that there was an express promise in writing to repay it if it should be ascertained that the Port Arthur Branch of the Russo-Chinese Bank had not collected the money on the draft for $36,194.80, drawn by the Centennial Mill Company in favor of the National Bank of Commerce on Clarkson & Company of Port Arthur, China; the other that there was an implied promise to re-pay the money if it should be ascertained that the money had not been collected by the Port Arthur Branch, because in that case the money was advanced and paid by the plaintiff to the defendant upon a mistake of fact.

The plaintiff claims that on or about the 11th of December, 1903, the Centennial Mill Company of Seattle had agreed to sell to Clarkson & Company of Port Arthur, China, about 36,000 sacks of flour for the sum of $36,194.80; that the Centennial Mill Company drew a draft in favor of the defendant for said amount upon Clarkson & Company of Port Arthur, and caused the flour to be shipped on the steamer "Hyades" from Seattle to Port Arthur, receiving from the Boston Steam-

ship Company and the Boston Tow Boat Company bills of lading for the shipment of flour. The bills of lading showed that the consignor was the Centennial Mill Company, the Centennial Mill Company being both consignor and consignee of the shipment; that the shipment was also covered by an insurance policy issued by the Fireman's Fund Insurance Company in the sum of $40,000; that the bills of lading, insurance policy and other documents were endorsed by the Centennial Mill Company in blank and attached to the draft for $36,194.80 and delivered with the draft to the National Bank of Commerce of Seattle, the defendant in the action. That the defendant endorsed the draft payable to the order of the Russo-Chinese Bank of Port Arthur; that the draft was received by the defendant at Port Arthur and presented to Clarkson & Company for acceptance about January 30th, 1904. That the draft by its terms became payable on the 30th of April, 1904; that it was not paid at the time of its maturity and that on the 2d of May, 1904, it was protested for non-payment; that a state of war existed between Russia and Japan about the 9th of February, 1904, and during the remainder of that year and that Port Arthur was invested both by land and sea by the Japanese forces; that on the 26th of May, 1904, the plaintiff mailed to the defendant at Seattle, Washington, notice of the non-payment of the draft together with the

draft itself and the official protest of the Notary who protested the draft. That subsequently Port Arthur was captured by the army of Japan and that all of the books, papers and records of the Russo-Chinece Bank were seized by and retained in the possession of the Japanese for more than a year. That while said books and records of said Russo-Chinese Bank were in the hands of the Japanese the defendant demanded from the plaintiff the payment in full of the draft and threatened to sue the plaintiff in the courts of the United States if the draft was not paid and that on the 9th of November, 1904, the plaintiff, being without information as to the payment or non-payment of the draft, and without means of information thereof, paid to the defendant the sum of $36,113.70 and subsequently on the 29th of Decembmer, 1904, paid to the defendant the further sum of $2298.49, in accordance with the terms of the draft, with the provision that if it should thereafter be ascertained that if the draft had not been paid by Clarkson the sum should be repaid to it by the defendant, and that the defendant assented to such provision. That the plaintiff afterward ascertained that the draft had not been paid and instituted this suit for the collection of the money so paid by it in the aggregate sum above mentioned. (Record pp. 2-6).

To the complaint the defendant filed its amended answer, admitting the drawing of the draft by the Centennial Mill Company with the documents attached, duly endorsed, and that they were sent to the Russo-Chinese Bank at Port Arthur during the time specified in the complaint; admitted that demand was made upon the defendant for the return of the money paid on November 9th and December 29th, 1904, and denied that the draft was not paid by Clarkson & Company prior to the time of the remittances by the plaintiff to the defendant and denied the other allegations of the complaint. For a first affirmative defense the defendant alleged that the draft of December 11th, 1903, for $36,194.80 was paid by Clarkson & Company to the Russo-Chinese Bank. For a second affirmative defense that the draft and documents were duly drawn, endorsed and delivered to the Russo-Chinese Bank to be delivered upon the payment of the draft. That by reason of the assignment of said draft and the documents by the defendant to the plaintiff it became the duty of the plaintiff under the custom among bankers at Oriental ports, including the port of Port Arthur, and under the law merchant, to present said draft for acceptance upon the day of its arrival or the succeeding day, and that the plaintiff did not present the draft for several weeks thereafter, after an unreasonable delay. That it also became the duty of the plaintiff under the

custom of bankers, as above stated, to look after, protect and care for the flour represented by the bills of lading upon its arrival at Port Atrhur. That it was the duty of said plaintiff to warehouse said flour and to insure the same, and that it became the duty of the plaintiff by reason of the instructions given to the plaintiff by the defendant, and by reason of the custom among bankers, not to permit said flour represented by said bills of lading to be appropriated by Clarkson & Company or by anyone else; that the plaintiff claimed that the flour represented by the bills of lading was appropriated by Clarkson & Company to their own use and that the proceeds to the same were not applied to the payment of said debt or any part thereof. Defendant further alleged in its answer that if the proceeds of the sale of said flour were not used to apply upon the payment of said draft and that the failure to have the same so applied was due to the carelessness and negligence of the plaintiff and was a breach of the duty that plaintiff owed to the defendant to cause the proceeds of the sale of said flour to be utilized for the payment of said draft, and that any failure to have the proceeds of the sale of the flour applied to the payment of the draft, if said proceeds were not so applied, was due to gross carelessness and negligence on the part of the plaintiff for which the defendant was in no wise responsible. That the plaintiff did not

protest the draft on the date of its maturity and did not return the draft and documents accompanying the same, all without excuse or reason, and held the same, to the great injury and damage of the defendant all of which was a gross neglect of the duty owed by the plaintiff to the defendant, as before stated. (Record pp. 7-k4).

To the answer of the defendant the plaintiff duly filed its reply, denying the affirmative allegations thereof (Record p. 15).

Upon the issues thus made up the case proceeded to trial and a general verdict was returned by the jury in favor of the defendant, and, at the request of the plaintiff, a special verdict was also submitted to the jury, and the jury returned a special verdict, as follows:

"We, the jury in the above-entitled cause, find that the Port Arthur Branch of the Russo-Chinese Bank did receive payment for the draft dated December 11, 1903, on account of which the plaintiff made the remittances to the defendant alleged in the complaint. Charles Osner, Foreman." (Record p. 18).

Thereafter judgment was entered upon the verdict in favor of the defendant.

ARGUMENT

This is the second appeal in this case. Upon the former appeal this Court held that the action was not an action for the recovery of money upon an express contract but was an action for the recovery of money paid under a mistake of fact, if we correctly interpret the decision of this Court rendered on the 3d of April, 1911, and reported in 187 Fed. p. 80.

On page 37 of the brief of the plaintiff in error filed in this Court upon the former hearing, counsel for the plaintiff in error said:

> "It is, however, submitted that the issues framed by the pleadings in this case do not show an attempt to recover upon an express contract but upon an implied agreement to restore money which had been paid under a mistake of fact."

Taking this contention of counsel in the light of the opinion of this Court we assume that the issues must be construed as stating a cause of action for the recovery of money paid under a mistake of fact and not upon an express contract for the return of the money.

We make these preliminary observations for the reason that we have not yet been favored with a copy of the brief for the plaintiff in error in this case, and must, to some extent, speculate as to the theory that will be

assumed by counsel for the plaintiff in error and also as to what assignments of error will be relied upon by them, reserving the privilege of answering the brief of counsel by a supplemental brief.

THE DRAFT OF DECEMBER 11th, 1903, FOR $36,194.80 PAID PRIOR TO REMITTANCES BY PLAINTIFF TO DEFENDANT OF AMOUNT SOUGHT TO BE RECOVERED IN THIS ACTION:

If the draft were in fact paid then it is wholly immaterial whether the action was predicated upon express contract or an action to recover money paid under a mistake of fact. The plaintiff caused to be submitted to the jury a special verdict requiring the jury to answer a specific question as to whether or not the original draft was paid by Clarkson & Company, and the jury answered that the draft had been paid by Clarkson & Company. If such is the fact it further becomes immaterial what, if any, errors might have been committed by the lower court upon other branches of the case.

It becomes necessary, therefore, to determine whether there was any evidence sufficient to support the finding of the jury that the draft had been paid.

"The verdict of the jury upon evidence sufficient, if true to support the findings, cannot be disturbed by the Supreme Court."

Pachko v. Wilkeson Coal & Coke Co., 46 Wash., 422.

"The Supreme Court will not set aside a verdict because of conflict in evidence supporting it."

McKay v. Anderson Steamboat Company, 51 Wash., 679.

Edwards v. Seattle, Renton & Southern Ry. Co., 62 Wash. 77.

"The weight and preponderance of the evidence is for the jury where the evidence is conflicting."

Richardson v. Agnew, 46 Wash., 117.

"A verdict upon conflicting evidence will not be set aside upon appeal, although contrary to the conviction of the Supreme Court."

Warwick v. Hitchings, 50 Wash., 140.

Meador v. Northwestern Gas & Elec. Co., 55 Wash., 47.

Bennett v. Seattle Elec. Co., 56 Wash., 407.

Kincaid v. Walla Walla Valley Traction Co., 57 Wash., 334.

Olmstead v. Olympia, 59 Wash., 147.

And this Court has frequently held that if there is any evidence sufficient if true to support the verdict of the jury, such verdict will not be disturbed on appeal, even though the evidence be conflicting and of such conflicting character that the Appellate Court would have reached a contrary conclusion from that reached by the jury.

"It may be that if we were to usurp the functions of the jury, and determine the weight to be given to the evidence, we might arrive at a different conclusion. But that is not our province on a writ of error. In such a case we are confined to the consideration of the exceptions, taken at the trial, to the admission or rejection of evidence, and to the charge of the court and its refusals to charge. We have no concern with questions of fact, or the weight to be given to the evidence which was properly admitted."

Insurance Co. v. Ward, 140 U. S., 77, 70 Fed., 677.

What, then, does the testimony disclose in regard to the payment of the draft by Clarkson & Company? A number of plaintiff's witnesses have testified that the draft was never paid. However, there was an abundance of competent testimony introduced on the part of the defendant sufficient to support the finding of the jury.

The Russo-Chinese Bank is a single corporation with branches at Vladivostock, Port Arthur, Shanghai and elsewhere, but the various branches and the home office are one and a single corporation.

The evidence shows that the Vladivostock branch of the Russo-Chinese Bank in the spring of 1904 sent a telegram to the Shanghai branch of said bank to be delivered to Clarkson & Company, stating that all of the drafts of the Centennial Mill Company drawn through the National Bank of Commerce of Seattle had been paid. It is true that the officials of the plaintiff bank testified

that this telegram was sent at the request of Clarkson & Company and without any knowledge on the part of the Vladivostock branch as to whether or not the drafts, including the one in controversy, had been paid. But the jury might well have believed that the Vladivostock branch was authorized to make such statement and to send such telegram. Port Arthur was almost entirely cut off from the outside world during the spring and summer of 1904. Only telegrams to the Russo-Chinese Bank from its branches were permitted to be passed into the city by the Japanese authorities. Clarkson could not have any direct communication with the bank at Port Arthur. The only means of communication on the part of Clarkson was through the branch banks. His only source of information was through the Vladivostock branch. It is inconceivable that the Vladivostock branch of the Russo-Chinese Bank would have sent such a telegram upon the statement of Clarkson alone, because that branch bank knew that Clarkson had no information as to whether the drafts had been paid and that he could have no information upon that subject except such as he acquired through the Vladivostock branch, which was permitted to communicate by wire with the Port Arthur branch of the same bank; and Mr. Clarkson, called as a witness for the plaintiff, testified as follows: "I am unable up to the present time to say whether I was mistaken

in my statement that the draft had been paid, or not." (Record p. 115).

Again, the evidence shows that 79,000 rubles were transmitted from the Port Arthur branch to the Vladivostock branch between the 25th of March and the 26th of June, 1904, and that between the first of January, 1904 and March 23rd, 1904, 126,128 rubles were transmitted on account of Clarkson from Port Arthur to Vladivostock, and that the same was appropriated by the Port Arthur bank toward the liquidation of the indebtedness of Clarkson & Company to the defendant. (Record pp. 151-2). The evidence further shows that at the time of the commencement of hostilities between Russia and Japan there were only 6000 or 8000 sacks of flour in Clarkson's warehouse at Port Arthur upon the arrival of the "Hyades" flour; that Clarkson had very little other goods of any kind in addition to his stock of flour; that the Port Arthur bank had in its possession bills of lading for all of this flour and that in the early part of February, 1904, it received notice from Clarkson through the Vladivostock bank that W. S. Davidson had sold a large quantity of flour, or practically all of the flour then in Clarkson's warehouse to one Ginsburg, at a very much reduced price and the Port Arthur bank was directed to prevent the consummation of this sale, and that the bank did intervene in the mat-

ter and did succeed in preventing the consummation of the sale of the flour to Ginsburg at the prices agreed upon between Davidson and Ginsburg,—Davidson claiming to be at that time the representative of Clarkson & Company. So that the Port Arthur bank in February, 1904, had its attention called to the fact of the sale of a large quantity of flour by Clarkson & Company and it must have known that the moneys paid over to it by Clarkson & Company and remitted by the Port Arthur branch to the Vladivostock branch were, in large part, the proceeds of the sale of flour for which the Port Arthur branch had bills of lading to cover the drafts of the National Bank of Commerce, and yet, with this knowledge, it diverted the money from the Seattle bank to reduce the indebtedness of Clarkson to itself. Moreover, Mr. Short in his testimony stated that he advised the manager of the Port Arthur branch of the arrival of the "Hyades" flour and received permission from him to sell the flour and that he agreed to account to the bank for the proceeds of the sale thereof when made by Clarkson & Company. Notwithstanding this knowledge the bank withdrew, as above stated, 79,000 rubles from Clarkson's account at Port Arthur and remitted it to Vladivostock. There was certainly evidence tending to show that the Port Arthur bank must have known where the money paid over by Clarkson & Company to the Port

Arthur bank came from and must have known that it came from the sale of flour covered by bills of lading in their hands for collection, and the jury was certainly justified in finding from this evidence that the drafts had been paid by Clarkson & Company to the Port Arthur bank and had been appropriated by the Port Arthur bank to other purposes than remission to the National Bank of Commerce.

Again, on the 30th of April, 1904, the bank's witnesses admit that Clarkson paid over to the Russo-Chinese Bank at Port Arthur 67,000 rubles, the proceeds of the sale of the flour made to Ginsburg, and the jury was justified in reaching the conclusion that this money was the proceeds of the sale of the "Hyades" flour covered by the bills of lading held by the Port Arthur bank to secure the draft of $36,194.80 in controversy. The Port Arthur bank, knowing that it had in its possession certain drafts secured by bills of lading covering flour in Clarkson's warehouse could not be permitted to blindly close its eyes and allow Clarkson to sell this flour and then appropriate the proceeds thereof to any other purpose than the payment of the draft securing the same. During a state of war, with Clarkson himself absent and their managers driven out of the city, can it be possible that the officials of the

bank did not visit Clarkson's warehouse and obtain actual knowledge of the stock belonging to Clarkson, and which was being sold? If they had this knowledge that the proceeds of the sale were largely coming from the flour, it would be the grossest injustice to permit the Port Arthur bank to close its eyes and say that it did not know the source from which the money being paid over by Clarkson to them came, and with such knowledge of where the money came from the Port Arthur bank ought not, in good conscience, be permitted to say that it did not receive payment of the draft in question.

The Port Arthur bank further admitted that on April 30th, 1904, it received 67,000 rubles from Ginsburg, placed 25,000 rubles to the credit of Clarkson in its bank and remitted the balance to the National Bank of Commerce on account of other drafts which we shall mention later in this discussion. And yet at the time of the arrival of the "Hyades" flour securing the draft in question, there were only 6,000 or 8,000 sacks of flour in Clarkson's warehouse, so that the evidence traces into the Russo-Chinese Bank at Port Arthur the entire proceeds of the sale of the flour covered by the bills of lading in their possession

Moreover, the jury was justified in reaching the conclusion that the draft had been paid from other tes-

timony introduced in the evidence and which was not contradicted by the testimony of plaintiff's witnesses.

The Court will recall that the flour was originally owned by the Centennial Mill Company. It agreed to sell the flour to Clarkson & Company at Port Arthur; it drew a draft on Clarkson & Company for $36,194.80 in favor of the National Bank of Commerce of Seattle; procured bills of lading from the steamship company for the flour, together with insurance policies, and endorsed and transferred the bills of lading and the insurance policies to the National Bank of Commerce and the National Bank of Commerce in turn endorsed and transferred the draft to the Russo-Chinese Bank at Port Arthur and delivered the bills of lading and other documents to the Port Arthur bank, which received them. The bills of lading were collateral to the draft and were pledges for its payment. Bills of lading, under the statutes of the State of Washington, were negotiable instruments, and the endorsement and delivery of the bills of lading transferred the legal title of the documents to the Russo-Chinese Bank and the legal effect of the transaction was to transfer the title to the flour covered by the bills of lading to plaintiff.

"All bills of lading and transportation receipts of every kind are hereby declared negotiable, and may be transferred by endorsement of the party to whose order

such check or receipt was given or issued, and such endorsement shall be deemed a valid transfer of the commodity represented by such receipt and may be made in blank or to the order of another."

2 Rem. & Bal. Code, 3377.

"When a bill of lading or warehouse receipt is made to 'bearer' or in equivalent terms, a simple transfer thereof by delivery conveys the same title as an endorsement."

2 Rem. & Bal. Code, 3379.

So that the Russo-Chinese Bank, under the laws of the State of Washington, held the legal title to the flour securing the draft. It not only had the legal title to the bills of lading but it had the legal title to the flour itself. The statute above quoted is the law of the State of Washington, and in the absence of proof to the contrary must be regarded as the law at Port Arthur regulating bills of lading.

The flour was collateral security for the payment of the draft in question, and we believe it to be a well settled principle of law that where a pledgee, without specific instructions, takes over the collateral to itself, or releases the collateral from the pledge, such release of the collateral operates in law as payment of the claim, at least to the extent of the value of the collateral.

"It is a general rule that where collateral security is received for a debt, with power to convert the security into money, this is specifically applicable to the

payment of such debt; the same person being the party to pay and receive, no act is necessary, and the law makes the application. If the proceeds equal or exceed the amount of the debt it is *de facto paid;* no action would lie for it; and proof of these facts would support the defense of payment. It is like the ordinary case of a banker or factor receiving securities of his principal, by endorsement or otherwise, on which he has a lien for his advances; when received the proceeds operate as a payment *pro tanto.* It follows as a necessary consequence, that an amount equal to the existing debt only can be applied; the debt is then satisfied and discharged and if there be a surplus it is money had and received to the use of the endorser the beneficial proprietor of the note. It is money which the defendant cannot hold."

Hunt v. Nevers, 32 Mass., 504.

"When the collateral note is collected and the proceeds received by the pledgee, it operates as a payment *pro tanto* of the debt secured."

Randolph on Commercial Paper, 795.

In *Cocke v. Chaney,* 14 Ala., 65, it is held that when a creditor who has received a note as collateral security transfers it to another he must be understood to have elected that mode of payment and to have made the security a substitute for the debt. *Westphal v. Ludlow,* 6 Fed., 348. *Gilliam v. Davis,* 7 Wash., 332.

A. T. Short, a witness for the defendant, testified that he was Assistant Manager for Clarkson & Company at Port Arthur until the early part of February, 1904. That upon the arrival of the Steamship "Hyades"

with the flour securing the draft in question, he went to the Russo-Chinese Bank at Port Arthur and stated to Mr. Ofsiankin, the manager of the defendant bank at Port Arthur, that the goods had arrived; that this was about the middle of January, 1904, and that he accepted the draft and at the same time, on behalf of Clarkson & Company, gave a letter of guaranty to the Port Arthur bank containing the provision that the flour was the property of the Russo-Chinese Bank until paid for and agreed in such letter that Clarkson & Company would sell the flour and account to the bank for the proceeds thereof, (Rec. pp 140-143-155) and further testified that the manager of the bank directed Clarkson & Company, through him, to take over the flour, sell it and account to the bank for the proceeds, and that this arrangement was the one invariably made between the bank and Clarkson & Company covering all shipments of flour made by the Centennial Mill Company.

The testimony as to this letter of guaranty and the permission given by Ofsiankin to Short is not contradicted; neither is the testimony of Ofsiankin produced by the plaintiff in this case, although the evidence shows that Ofsiankin at the time the depositions were taken on behalf of the plaintiff was the resident manager of the defendant bank at Vladivostock. The Port Arthur

bank disregarded its instructions to deliver the documents and the flour only upon payment of the draft, and by an arrangement with Clarkson & Company took over the title to the flour and affirmatively consented to the sale of the flour by Clarkson & Company upon their promise to account for the proceeds to the bank at Port Arthur. This transaction amounts in its legal effect to a taking over of the goods by the Port Arthur bank itself and amounts to a payment of the draft by Clarkson & Company to the Port Arthur bank in so far as the rights of the National Bank of Commerce are concerned.

"Upon the plea of payment, to debt on bond, it is competent for the defendant to give in evidence that wheat was delivered to the plaintiff on account of the bond at a certain price; and that the defendant assigned sundry debts to the plaintiff, part of which were col lected by the plaintiff, and part lost by his indulgence or negligence."

Buddicum v. Kirk, 3 Cranch (U. S. Sup. Ct. 294).

Reeves v. Plough, 46 Ind., 350.

"Where a shipper consigned goods to his own order, at the time drawing in favor of a bank 'for collection' a draft on the person to whom the goods were to be delivered on payment of the draft, and attached the draft to a bill of lading so endorsed as to give the bank control of the possession of the goods, a delivery of the goods by the bank to the drawee of the draft, without requiring its payment, was, as against the owner, a conversion."

Hobbs v. Chicago Packing & Provision Co., 25 S. E., 584.

The evidence of Short as to the letter of guaranty under which Clarkson & Company took over the flour under an agreement to account to the Port Arthur bank for the proceeds of the sale of the flour was admissible under the plea of payment and was evidence of payment and the jury was justified, on this evidence alone, in making the finding that the draft was in fact paid. The Port Arthur bank rendered itself immediately liable to the National Bank of Commerce when it released the collateral and consented that Clarkson should take the flour and sell it and account to the bank for the proceeds, and the Port Arthur bank as against the National Bank of Commerce or in so far as its rights were concerned, acquired the title to the flour and could only look to Clarkson for its reimbursement. The draft was in fact paid and the special finding of the jury is amply supported by the evidence.

THE PLAINTIFF CANNOT RECOVER IN THIS ACTION EITHER UPON AN EXPRESS CONTRACT OR FOR MONEY PAID UNDER MISTAKE OF FACT BY THE RUSSO-CHINESE BANK AT THE TIME THE REMITTANCES WERE MADE ON NOVEMBER 9th, 1904, AND DECEMBER 29th, 1904, IF IT WAS IN-

DEBTED AT THAT TIME IN THE AMOUNT OF SUCH PAYMENTS TO THE NATIONAL BANK OF COMMERCE:

The first remittance was made November 9th, 1904, and the letter transmitting it contained the following provisions:

"It remains of course however understood that in case your above remittance proves not to have been paid for by Clarkson & Company you are held responsible to refund the amount of our to-day's cheque." (Rec. p 92.)

On December 5th, 1904, the National Bank of Commerce acknowledged receipt of this letter and stated that said remittance was not sufficient to cover the draft, and further said:

"We on our part agree upon return to us of both sets of bills, showing that the draft has not been paid, to reimburse you in the sum paid us, providing that we were in no wise injured by the fact that your Port Arthur branch has indefinitely held the bills after their maturity, at which time they could have been returned to us and we could have collected from the Steamship Company." (Rec. p 93.)

On December 29th, 1904, the Russo-Chinese Bank acknowledged the recipt of the letter of December 5th from the National Bank of Commerce and remitted the additional sum of $2,298.49. The National Bank of Commerce on January 18th, 1905, acknowledged receipt of the remittance and referred to the additional conditions upon which it agreed to make the return.

The Court will observe that the purpose of the National Bank of Commerce was to proceed against the Steamship Company if the Steamship Company had turned the goods over to Clarkson & Company without the payment of the draft, but the evidence of Mr. Short shows that the Russo-Chinese Bank, which held the legal title to the bills of lading and the flour, notified Clarkson & Company through Short, who was the agent of the Steamship Company, that delivery of the flour could be made to Clarkson & Company, Merchants, and that the flour could be sold by Clarkson & Company. This evidence was not contradicted, and it would have been useless, in view of these facts, for the National Bank of Commerce to have proceeded against the Steamship Company, because the Russo- Chinese Bank at Port Arthur had relieved the Steamship Company from any liability whatsoever, if the testimony of Mr. Short is to be believed, and the jury undoubtedly did believe it. The Russo-Chinese Bank, therefore, by its action in taking over the flour itself and consenting to the sale of it by Clarkson, on his promise to account to that bank for the proceeds of the sale thereof, released the Steamship Company and placed it beyond the power of the National Bank of Commerce to resort to that remedy. The Steamship Company had a right to release the flour upon the production of the bills of lading. If the Port

Arthur branch held the legal title to an possession of the bills of lading that bank was the only person who had the legal right to direct the Steamship Company to release the flour.

In the case of the *First National Bank of Pullman v. Northern Pacific Railway Company,* 28 Wash., 439, the Court held that the Railway Company was not authorized to release a shipment to anyone except the holder of the bill of lading and held the Railway Company liable for the release of the shipment, even upon the order of the consignor of the wheat.

"A bill of lading is negotiable and under this section when made to 'bearer' or in equivalent terms, a simple transfer thereof by delivery conveys the same title as an endorsement; hence the power of endorsement is not restricted to the consignee, but the carrier who has delivered such bill of lading to the shipper is conclusively charged with knowledge of the fact, and of its negotiability, both by custom and statute."

First Nat'l Bank v. N. P. Ry. Co., ~~28~~ 28 Wash 439

Furthermore, it would be grossly unconscionable to allow the Russo- Chinese Bank to recover back the money in controversy from the National Bank of Commerce, when the uncontradicted evidence shows that the Russo-Chinese Bank has rendered itself liable to the National Bank of Commerce by reason of its affirmative acts in causing the shipment to be released by the Steamship Company and in affirmatively consenting to take the

flour over itself and allow the same to be sold by Clarkson & Company upon the promise of Clarkson & Company to reimburse the Russo-Chinese Bank, even though it should be found that Clarkson & Company never paid the Russo-Chinese Bank.

GINSBURG TRANSACTION:

It will be contended, however, that when Ginsburg paid the 67,000 rubles on April 30th, 1904, for the flour purchased by him from Clarkson & Compnay, the Russo-Chinese Bank remitted about 42,000 rubles of this money to the National Bank of Commerce in payment of two certain drafts, one for $4,136 and the other for $16,155. These two drafts were similar to the one in controversy and represented the purchase price of two shipments of flour made by the Centennial Mill Company to Clarkson & Company, and drafts were drawn for the amount of the shipments with bills of lading and documents endorsed and attached as in the case of the draft for $36,194.80. Mr. Short testified that the same arrangement as to the letter of guaranty and the taking over of the flour by the Russo-Chinese Bank and the sale of the same by Clarkson & Company under the promise to account for the proceeds of the sale of such flour to the Russo-Chinese Bank was made as in the case of the Hyades flour; so that it is manifest that at the time

the Russo-Chinese Bank paid the two drafts for $4,136 and $16,155 respectively on the 30th day of April, the Russo-Chinese Bank was already liable for the amount of these drafts to the National Bank of Commerce. Contrary to instructions they had taken a letter of guaranty from Clarkson & Company and consented to the release of the flour from the Steamship Company and consented affiirmatively to its being taken over and sold by Clarkson & Company, and if the Port Arthur branch did pay these drafts out of the proceeds of the sale of the flour to Ginsburg, it was paying its own obligation out of the money realized from the sale of flour pledged for the payment of the $36,194.80 draft. Consequently it is immaterial whether the National Bank of Commerce received the money from Ginsburg or whether it did not. In paying over the money for the amount of these two drafts, the Port Arthur branch was paying its individual indebtedness to the National Bank of Commerce which it had become obligated to pay by reason of its taking the letter of guaranty from Clarkson & Company at the time of the arrival of the shipment securing the two drafts, and the testimony of Short in regard to the arrangement as to the letter of Guaranty is corroborated by the testimony of Davidson and the testimony of Clarkson, and Clarkson testified that he had given instructions to the manager at

Port Arthur never to take any goods out of the warehouse which had been brought over by steamer unless the bill of lading was produced or unless his manager procured permission from the bank and had made satisfactory arrangements with the bank for the release of the goods

PAYMENT OF AMOUNT OF DRAFT BY CENTENNIAL MILL COMPANY:

It will also be contended that the Centennial Mill Company had already paid the National Bank of Commerce the amount of the draft in question and that the National Bank of Commerce was not injured in any way by any negligence or wrong doing on the part of the Port Arthur bank, inasmuch as it had received its money.

The testimony shows that after the defendant had received the amount of the drafts on November 11th, 1904, it paid this money over to the Centennial Mill Company and the Centennial Mill Company now has all of the money that the National Bank of Commerce received from the Port Arthur bank. Further, if the National Bank of Commerce was not acting as the owner of the shipment after it had been re-paid its advances by the Mill Company, still it was acting as the agent and rep-

resentative of the Mill Company and we fail to see how the rule of law could be different in the one case from that in the other.

It is claimed the money was paid over under a mistake of fact and the law imposed the same duty to act in good faith and obey instructions, whether these instructions were given by the real owner or by the agent of another The Port Arthur bank had no more legal right or authority to disregard the instructions given by the National Bank of Commerce, whether it was acting as owner or agent and we fail to see any merit in this contention.

The evidence shows that the Russo-Chinese Bank took over this flour on its own account and allowed it to be sold by Clarkson & Company and if it failed to collect from Clarkson there is no legal reason why it should not be compelled to account to the Centennial Mill Company or to the National Bank of Commerce as agent than it would be to account to the National Bank of Commerce as the owner of the property.

FIRST, SECOND AND THIRD ASSIGNMENTS OF ERROR: (Rec. pp 243-248).

The three enumerated assignments of error all relate to certain interrogatories propounder to R. R. Spencer, a witness on behalf of the plaintiff, and the questions and answers all bear upon the admissibility of evidence as to the customs among bankers in the handling of drafts secured by bills of lading, such as the one involved in this controversy. Counsel objected to the questions upon the ground that this was not a case where proof of a custom could be shown, inasmuch as is was contended by the plaintiff and the defendant that a special contract existed between the plaintiff and the defendant in the handling of this particular shipment of flour represented by the bills of lading securing the draft of $36,194.80. This contract which counsel alleges makes improper any evidence as to admissibility of proof of custom is found on page 123 of the record, and consists of a letter dater January 22nd, 1904, written by the Russo-Chinese Bank to the National Bank of Commerce and the particular provisions upon which counsel for plaintiff aparently relies are found in paragraphs two and three of the letter in question.

We call the Court's attention to the fact that the draft for $36,194.80 with the documents was sent by the National Bank of Commerce to the Russo-Chinese Bank on December 11th, 1903, with instructions to deliver against payment and there is no proof of any assent by the National Bank of Commerce to the conditions attempted to be imposed by the letter of January, 22nd, 1904. The testimony of Mr. Short is to the effect that the Russo-Chinese Bank accepted the collection and took over the handling of the goods during the latter half of January, 1904. The plaintiff by accepting the collection upon the terms contained in the letter written by the National Bank of Commerce transmitting the draft and the documents, and this letter only directed the delivery of the goods upon the payment of the draft. Consequently the proof of the existence of a custom in regard to the handling of drafts was clearly proper under the pleadings and under the facts in this case.

Moreover, we desire to call the Court's attention specially to paragraphs two and three of the letter of January 22nd, 1904 (Rec. p. 123). Paragraph two simply asks the National Bank of Commerce to give specific instructions but does not state what the Russo-Chinese Bank would do unless such instructions be given. Presumably the Russo-Chinese Bank would follow the custom of bankers in the handling of collections such as

the one in question and proof of what that custom was is clearly admissible, and the testimony of Mr. Short only went to show what the custom was, in the absence of specific instructions, in the handling of documents, and we submit that the letter does not show any special contract

Paragraph three of the letter of January 22nd, 1904, is as follows:

"Our Bank does not guarantee that the goods be stored in due time when there is no storage accommodation obtainable, and takes no responsibility whatever if the same are not landed in perfect condition, nor if the goods are deteriorating or becoming of lower value in consequence of price fluctations while under our Bank's control."

This provision requires a careful analysis. In the first place the bank says that it does not guarantee that the goods be stored in due time when there is no storage accommodation obtainable. This clause specifically expresses the particular instance in which the Russo-Chinese Bank will not guarantee the storage of goods. The inference must follow that in all other cases the bank would store the goods. The bank impliedly undertakes that it will see to the storage of the goods; it only denies responsibility for failure to store when there are no storage accommodations, and the evidence shows that there were other independent warehouses at Port Arthur at the time of the arrival of the goods

in question, and that the Russo-Chinese Bank knew of the goods and knew that Clarkson had them in his possession, and knew that he was the agent of the Steamship Company.

The letter further states that the bank will not be responsible for deterioration or fluctations in prices "*while under our bank's control.*" This clause expressly recognizes the fact that the goods themselves were under the control of the bank. The Russo-Chinese Bank by the writing of that letter must be conclusively presumed to have intended to exercise physical control over the flour except in the specified cases above enumerated in said letter . What the duty of the bank was and what was the custom among banks was clearly admissible under the pleadings. The affirmative defense of the defendant pleads the custom among bankers and the custom at Port Arthur, and the evidence was properly admitted.

The evidence was properly admitted upon another ground. The testimony of the defendant's witnesses disclosed that the Russo-Chinese Bank had taken a letter of guaranty from Clarkson & Company in which Clarkson was compelled to recognize the ownership of the flour in the Russo-Chinese Bank. This affirmatively shows that notwithstanding the terms of the letter

of January 22nd, 1904, the Russo-Chinese Bank had not only the possession but the actual ownership of the flour itself, and the evidence was admissible to show that such action on the part of the Russo-Chinese Bank was contrary to the general usage and custom among bankers in the handling of drafts and collateral such as that in controversy in this action.

FOURTH, FIFTH, SIXTH, SEVENTH, EIGHTH AND NINTH ASSIGNMENTS OF ERROR:

(Rec. pp 248-252).

These assignments of error all relate to the admissibility of testimony, and what has been said as to the preceding assignments of error is equally pertinent in this connection, and we do not consider it necessary to discuss these assignments of error any more fully.

TENTH AND ELEVENTH ASSIGNMENTS OF ERROR: (Rec. p. 252).

These asignments are wholly without merit and even if there were any errors committed they are harmless.

TWELFTH ASSIGNMENT OF ERROR: (Rec. p 253).

Counsel for plaintiff objected to the following question propounded to the witness A. T. Short.

Q. In all your dealings with the Russo-Chinese Bank in handling the other shipments of the Centennial Mill Company, I will ask you what arrangement, if any, was made with the bank in regard to the handling of this flour?

The question was competent, pertinent and material. The contention is made by the Russo-Chinese Bank that the 67,00 rubles received by the Port Arthur bank on the 30th day of April,, 1904, were applied to the extent of 42,000 rubles toward taking up the two drafts of $4,136 and $16,155 drawn by the Centennial Mill Company in favor of the National Bank of Commerce upon Clarkson & Company; that the proceeds of the sale of the "Hyades" flour securing the draft in controversy were paid over to the National Bank of Commerce on other drafts owned by it and consequently that the Seattle bank was not injured because the Ginsburg money was in part received by the Seattle bank.

It is the contention of the defendant that the $4,136 draft and the $16,155 draft are each secured by bills of lading and that the drafts were drawn against payment and the question was material in showing that the Russo-Chinese Bank had taken a letter of guaranty in connection with these two drafts and had consented that Clarkson should sell the flour and account to the Russo-Chinese Bank for the proceeds of the sale thereof; that the Russo-Chinese Bank by doing so had be-

come obligated to the National Bank of Commerce upon these two drafts and that the diversion of the Ginsburg money, while it came in part to the National Bank of Commerce, it nevertheless was a payment by the Russo-Chinese Bank of its individual obligation, incurred by reason of its negligence in handling the two drafts in question. No error was committed in admitting this testimony.

THIRTEENTH ASSIGNMENT OF ERROR:

(Record p. 253)

The plaintiff objected to the following question propounded to the witness Short:

"Did they know that Clarkson & Company were in possession of the 'Hyades' flour or thirty-six thousand sacks?"

to which the witness answered:

"They could not help but know it."

Whether or not the Russo-Chinese Bank knew that Clarkson & Company was in possession of the flour was certainly a material matter and the defendant was entitled to have the witness state whether the bank knew of such possession by Clarkson & Company. There might be some question as to the weight to be attached to the testimony by the jury, but it was certainly competent

evidence from which the jury could infer this knowledge on the part of the Russo-Chinese Bank.

FOURTEENTH ASSIGNMENT OF ERROR:
(Record p. 253)

The answer of the witness Short to which the plaintiff objected was as follows:

"I would tell them or Davidson would tell them. The object of getting a ninety days' sight draft was that we could get delivery without payment, but that we paid the money as soon as we got it. As soon as the flour was sold the money was collected in." (Record p. 146).

The witness was testifying as to knowledge on the part of the Port Arthur bank that Clarkson was the agent of the Steamship Company. The statement of the purpose in making the arrangement as to the letter of guaranty was a part of the *res gestae* and even if erroneous was entirely harmless.

FIFTEENTH ASSIGNMENT OF ERROR:
(Record p. 253).

In this assignment the plaintiff complains of the instruction given by the trial court, and the plaintiff has numbered the instruction about which it complains under this assignment of error and we shall discuss the instructions under the numbers specified by the plaintiff in its assignments

First Instruction:

As we have heretofore shown, Sections 3377 and 3378, 2 Rem. & Bal. Code, provide that bills of lading are negotiable in character and an assignment or transfer of a bill of lading should be deemed a valid transfer of the commodity represented by the bill of lading, and these sections of the Code have been construed by the Supreme Court of the State of Washington in the case of the *First National Bank of Pullman v. Northern Pacific Railway Company*, 28 Wash., 439, above mentioned. The law of Port Arthur, in the absence of proof to the contrary, must be presumed to be the same as the law of the State of Washington, and there was no proof to the contrary. The statutes of the State of Washington upon this subject must be read into and must be construed to be a part of the contract relating to the bills of lading in this case; so that there can be no question but that the legal title to the flour was vested by virtue of the assignment of the bills of lading in the Russo-Chinese Bank. No error, if any, contained in the instruction quoted in the assignment of error at page 254 of the record, can be presented to this Court, except that portion of the instruction to which the plaintiff excepted at the time of the trial. The exception taken by the plaintiff at the trial is found on page 231 of the record, and is as follows:

"We except to the giving of the instruction to the effect that the defendant bank became invested by virtue of the transfer to it of the documents with the legal title to the flour; and also to the instruction and to each and every part thereof to the effect that by the endorsement and transfer of those documents the plaintiff bank became invested with the legal title to the flour."

No other objection to the instruction can be urged at this time. The plaintiff is limited to that portion of the instruction covered by its exception, and the instruction, in view of the statutes above quoted and the decisions of the Supreme Court of Washington, unmistakably shows that the legal title to the flour was in fact vested in the Russo-Chinese Bank. There was unquestionably a symbolical delivery of the flour and a transfer of the legal title to the Port Arthur bank, and there was no error in this portion of the trial court's instruction.

Second Instruction:

The second instruction complained of by plaintiff is as follows:

"It was authorized to do whatever was necessary in the manner of incurring expense, which would be chargeable against the property, and to be compensated out of the property in its hands, and it was required to deal with the property in the same way that an intelligent and prudent owner of property would deal with his own property, to act for and in place of the National Bank of Commerce in handling the business there at Port Arthur as the National Bank of Commerce would

have acted if it had been there, and in a position to act for itself As the agent for the owner it was obligated to account for the amount of the draft, to account for the security which the bill of lading constituted, and it cannot be excused from obligation to account by saying that the flour disappeared without its knowledge, and require the defendant in this case in order to fasten an obligation upon it, to prove that it was negligent. A principal does not have to prove those things in regard to property or valuables that go into the hands of an agent; the agent must render an account in order to be cleared of obligation and liability That is the rule that is to be applied in this case in determining whether the plaintiff in this case paid out money which it was not obligated to pay to the defendant on account of the draft."

The exception to this instruction is as follows:

"We except to the instruction given to the effect that the Russo-Chinese Bank was obliged to look after and take care of the flour."

The effect of the instruction is simply that the Russo-Chinese Bank was required to exercise ordinary care and diligence in performing its duties as the agent of the National Bank of Commerce in making the collection and looking after the flour, and if the legal title was vested in the Russo-Chinese Bank, then the conclusion would be inevitable that it was the duty of the Russo-Chinese Bank to exercise ordinary care and diligence in protecting the collateral. But even if such should not by this Court be held to be the law, the instruction is entirely immaterial in view of the uncontradicted tes-

timony in the case. The testimony discloses, as we have heretofore shown, that the Port Arthur bank did take over the flour; did take a letter of guaranty, by which Clarkson was compelled to recognize the ownership of the flour in the Port Arthur Bank, and that Clarkson was required to give to the Port Arthur bank an agreement to sell the flour and account to that bank for the proceeds thereof. It makes no difference whether the law required the Port Arthur bank to look after the flour or not, in view of the record, which unequivocally discloses that the bank did take over the flour and did attempt to look after it, and in view of the letter of January 22d, 1904, wherein the Port Arthur bank said it would not guarantee storage unless storage facilities were obtainable and the evidence shows that there were independent warehouses wherein the flour might have been stored.

Third Instruction:

The third instruction complained of by the plaintiff is as follows: (Record p. 255).

"If the bank at Port Arthur neglected its obligations or failed to perform its obligations in regard to presentation and demand of payment and protest and giving notice, then it became liable to the defendant for the amount of the draft and for all that it received from the plaintiff bank in the case. If so liable the plaintiff bank has no right of action now to get the money back that it did pay to meet that liability."

The objection to this instruction was that the plaintiff became liable for the full amount of the draft and not for the amount only of the damage actually suffered.

We think that this instruction correctly stated the law, but even if it did not, the plaintiff cannot complain in view of the uncontradicted testimony.

The evidence shows that the flour was worth about two and one-half roubles per sack, and that a rouble was worth about 50 cents American money, so that the value of the flour is affirmatively shown to have been more than equal to the amount of the draft.

Fourth Instruction:

The plaintiff has quoted on page 255 of the record that portion of the instruction about which it complains, but we think that the Court should consider the entire instruction upon the question of burden of proof as given by the Court, which is as follows:

"The burden of proof rests upon the plaintiff in this action to establish by a fair preponderance of the evidence that the draft in question was not paid by Clarkson & Company to the Russo-Chinese Bank and that at the time the money in controversy was paid by the plaintiff to the defendant the Russo-Chinese Bank was not indebted to the defendant in the amount of said draft and that the plaintiff had not rendered itself liable to the defendant by permitting Clarkson & Company to appropriate the flour covered by the bill of lading securing the draft, and unless the plaintiff established by a fair preponderance of evidence the fact that such

payment was not made by Clarkson & Company prior to the date of the payment of the money in controversy by the plaintiff to the defendant, and that the plaintiff had not rendered itself liable by permitting Clarkson & Company to sell the flour prior to the payment of the draft, then I instruct you that the plaintiff cannot recover in this action and your verdict must be for the defendant."

Whether the action be regarded as one upon an express contract or an action for the recovery of money paid under a mistake of fact, the plaintiff, in the very nature of the case, must establish that the payment was not made by Clarkson & Company to the Russo-Chinese Bank. The law says that such proof must be made by the plaintiff and in case of a claim to recover money paid under a mistake of fact, the fact of the mistake must be established; and the plaintiff recognized this burden at the time it filed its complaint. In fact, the non-payment of the draft by Clarkson & Company was the very gist of the action from the view point of the plaintiff.

"The burden of proving the right to recover back payments is ordinarily on the plaintiff."

30 Cyc., 1325, and cases cited.

"Upon an issue raised by defendant as to the conversion of collaterals by the pledgee, the burden is on the pledgee to account for them."

31 Cyc., 870.

"When a creditor receives from his debtor notes or other securities as collaterals he becomes a bailee of such securities and as such he is bound to use ordinary dili-

gence, such as persons usually exercise in reference to their own matters, in endeavoring to collect such securities, unless there is an express agreement relieving him of such obligation, and the true rule is that where the creditor receives from his debtor either notes or obligations of any kind of third persons, as collateral security for the payment of his debt, he cannot, in the absence of an express agreement to the contrary maintain his action for the recovery of his debt without accounting for the collaterals by showing either that he has collected them and applied them as credits upon the debt, or that he could not by the use of due diligence collect them We do not think there was any error, therefore, in charging the plaintiffs with so much of the collaterals as they failed to collect by reason of their failure to exercise due diligence, there being no evidence that they could not be collected by the use of due diligence."

Montague v. Stelts, 15 S. E., 968.

So far as the question as to whether or not the draft was actually paid by Clarkson & Company to the Port Arthur bank is concerned, we do not think there can be any sort of question as to the burden being upon the plaintiff in this action to establish such fact of the nonpayment and whether the actions on the part of the plaintiff in turning over the goods to Clarkson & Company and taking the letter of guaranty from Clarkson & Company rendered the plaintiff liable to the defendant, we do not think there can be any doubt upon this proposition. The plaintiff had the legal title, the absolute power to control the shipment; it exercised that power and turned the goods over to Clarkson & Company upon

the promise of Clarkson & Company to pay for them, and the moment that the Port Arthur bank took the letter of guaranty and directed the release of the goods by the Steamship Company, it rendered itself liable to the National Bank of Commerce and at the time the remittances of the amount sued on in this action were made the fact, according to the uncontradicted testimony, was that the Port Arthur bank had done the thing that rendered it liable to the defendant, and therefore at the time such payments were made the Port Arthur bank was under a legal as well as a moral obligation to pay the amount that it did pay to the National Bank of Commerce.

Can it be said, therefore, that the money was paid under a mistake of fact, if the Russo-Chinese Bank, by reason of its actions, had incurred an obligation to pay the amount to the National Bank of Commerce that it did pay in November and December, 1904? The control of the shipment of flour passed into the hands of the Port Arthur bank. It had the legal title and exercised acts of ownership over it, and the trial court correctly instructed the jury that a bailee or pledgee was under the duty to account to its principal for the goods that had passed into its possession and under its control, and the authorities which we have cited abundantly sustain this proposition.

The Port Arthur bank, not only by its acts of omission but by its affirmative act of commission, participated in the loss of the flour to the defendant. The entire subject matter covered by the bills of lading, through the acts of the plaintiff was absolutely lost and destroyed, so far as the defendant was concerned.

"After proof of loss of the subject of a bailment the burden is on the bailee to show that he used diligence regarding the same."

Hawkins v. Haynes, 71 Ga., 40.

"When a bailee fails to return goods at the end of a bailment or account for their loss, the burden is upon him to satisfactorily show that it happened without legal negligence upon his part. This is equally true, whether by the nature of the bailment the bailee is bound to exercise ordinary care and diligence, or is liable only for gross neglect."

Donlan v. Clark, 45 Pac., 1.

When personal property passes into the possession of or under the control of a bailee and proof of loss is shown, the burden is certainly upon the bailee to show what he did with it or to show that he exercised ordinary care and diligence in protecting it. Now the facts in this case show—and it is not contradicted—that the Port Arthur bank not only did not protect the shipment but in disregard of the instructions under which he received it from the defendant, it took over the flour itself and affirmatively consented that the same should be sold by

Clarkson & Company under the promise of Clarkson & Company to pay over to the Port Arthur bank the money realized from the sale thereof. We fail to see wherein the Court erred in instructing the jury as it did instruct it in this connection.

Fifth and Sixth Instructions:

What we have heretofore said in this argument seems to us to answer the objections to the fifth and sixth instructions, and we do not deem it necessary to discuss these instructions further.

Seventh Instruction:

The seventh instruction quoted by the plaintiff on page 256 of the record must be taken in connection with what follows in the instruction as given by the Court, found in paragraphs one and two on page 230 of the record, wherein the Court told the jury that the Centennial Mill Company had paid the original draft to the defendant, and that the National Bank of Commerce after such payment was acting as the agent of the Centennial Mill Company and that it had a right to act as such agent and to carry on all the business in its own name had a right to maintain an action in its own name, for the reason that the laws of the State of Washington authorized a bailee of an express trust to prosecute and defend actions in its own name, and the defendant, by

taking title to the flour and acting in its business was authorized to act in its own name clear through to the finish of the transaction, although it may now be acting in the interest of the Centennial Mill Company, the consignor of the flour, and the instruction was certainly not objectionable in view of the conditions imposed by the National Bank of Commerce in its letter of December 5th, 1904, wherein it acknowledged the receipt of the letter of November 9th, 1904. (Record p. 93). And besides, what possible injury could the plaintiff have sustained even though said instruction should be held by this Court to be erroneous? The jury found that the draft had been paid by Clarkson & Company at Port Arthur, and any other errors made by the Court in regard to the protest of the draft, or to any other branch of the subject, must be held to be entirely harmless.

SIXTEENTH ASSIGNMENT OF ERROR:

Under this assignment the plaintiff complains of the refusal of the Court to give certain instructions requested by the plaintiff. We think the trial court gave the substance of the instructions requested by the plaintiff, or as much thereof as the plaintiff was entitled to have given. The remaining instructions requested but not given by the Court, we think, were properly refused. We

shall at this time only notice a few of the instructions requested.

1. The first instruction asked for a directed verdict on the ground that there was no proof of payment of the original draft by Clarkson & Company to the Port Arthur bank. We have heretofore pointed out the evidence that we think abundantly supports the finding of the jury that the draft was in fact paid. But this instruction should have been refused for another reason, viz: The jury might have found that the draft had not been paid, and still the plaintiff would not have been entitled to a directed verdict, because the uncontradicted evidence of the witness Short disclosed that the Port Arthur bank had rendered itself liable for the value of the shipment by permitting Clarkson & Company to take over and sell the flour under a promise to account for the proceeds of the sale thereof to the Port Arthur bank. The instruction was properly refused.

2. The Court committed no error in refusing to give the third and fourth instructions requested by the plaintiff. Under the evidence in this case the plaintiff did not act with due diligence in handling the documents accompanying the draft. Even if the duty of the Port Arthur bank was to look after the documents alone, still it would not be absolved from liability under the facts in

this case, for the reason that it did not undertake to adhere to its limited duty, as claimed by the plaintiff, to look after the documents alone,—but it had the legal title to the goods and took them over, requiring Clarkson to recognize its ownership of the goods and acted as owner in disposing of them.

According to the testimony of Mr. Spencer, a witness called on behalf of the plaintiff, and the testimony of Mr. Davidson, the duty of the plaintiff bank at Port Arthur was not limited to caring for the documents but it was required to store and protect the shipment and we think the law as well as the custom imposed this duty upon the plaintiff. Being invested with all the muniments of title and having absolute control of the shipment and exercising that control, it certainly was required to so handle the shipment and the documents as a reasonably prudent person would handle them while acting in the capacity of agent for another,—the defendant in this case.

3. The sixth instruction requested fails to state the law correctly in the first place, and in the second place it is not applicable to the facts and circumstances in this case. A knowledge of the fact that Clarkson & Company were the agents of the Steamship Company on the part of the Port Arthur bank was brought out by the testimony and the evidence was uncontradicted that the Port

Arthur bank directed Clarkson & Company, as the agents of the Steamship Company, to turn the flour over to Clarkson & Company, Importers, for sale under an agreement on the part of Clarkson & Company to account for the proceeds of the sale to the Port Arthur bank.

The other instructions requested, we believe, were properly refused, and that we have shown sufficient reason for their refusal in our argument upon other branches of the case.

We believe that this Court will be convinced by an examination of the record in this case: That the Port Arthur bank received the draft in question from the National Bank of Commerce, accompanied by bills of lading that conferred upon the Port Arthur bank absolute power and control over the documents and the flour covered by the bills of lading; that it presented the draft for acceptance to Clarkson & Company; that the same was accepted by Clarkson & Company and that at the same time the Port Arthur bank had knowledge of the arrival of the shipment brought home to it; that the Port Arthur bank knew that Clarkson & Company were the agents of the Steamship Company; that it not only knew that Clarkson & Company were selling the flour covered by the shipment pledged to secure the draft; that the Port Arthur bank required Clarkson to enter into a

written agreement by which the ownership of the flour was recognized in the Port Arthur bank and required Clarkson & Company to account for the proceeds of the sale of the flour to the said bank

It must be taken as established that Clarkson & Company would not have sold the flour without the consent of the Port Arthur bank The testimony of Mr. Short showed that he knew that the manager of Clarkson & Company would be sent to prison if he sold the flour without first obtaining permission from the bank to sell it. The testimony of the sole manager of the bank, Mr. Ofsiankin, was not taken by the plaintiff.

The finding of the jury that the draft had been paid by Clarkson & Company is abundantly supported by the testimony, and the fact must be apparent to this Court from an examination of the evidence in the case that the Russo-Chinese Bank was obligated to pay the National Bank of Commerce the amounts remitted to that bank in November and December, 1904, being the amount sued for in this action The plaintiff has neither a legal or moral right to recover the money in question and the judgment of the lower Court should be affirmed

Respectfully submitted,

E. S. McCORD,
J. A. KERR,

Attorneys for Defendant in Error.

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

RUSSO-CHINESE BANK (a Corporation), *Plaintiff in Error,* vs. NATIONAL BANK OF COMMERCE OF SEATTLE, WASHINGTON (a Corporation), *Defendant in Error.*	No. 2182.

SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR

Before the brief of the plaintiff in error was served upon us we had prepared our argument in support of the judgment rendered by the lower

court. Since receiving the brief of the plaintiff in error we feel that it is proper to make some reply to the argument of counsel upon a few propositions advanced by them in their brief.

Upon page 12 of their brief counsel contend that the court erred in instructing the jury that the Port Arthur bank became invested with the title and ownership of the flour. We have already in our former brief discussed this alleged error but we desire to make a few further observations upon it. Counsel contend that by the giving of this instruction the court undertook to determine the relative rights of the parties to this action, upon the theory that the relationship between them was one of vendor and vendee instead of principal and agent. We submit that the instruction quoted by counsel in their brief negatives this contention. The instruction expressly states that the Russo-Chinese Bank "became invested with the title and ownership of the flour as to all the world, *except the National Bank of Commerce of Seattle*, and had the legal right to sell and dispose of the flour and to receive the proceeds, subject to its duty as an agent to account to the National Bank of Commerce for it." This proposition of law was based

upon the provision of the statutes of Washington making a bill of lading properly endorsed and delivered a negotiable instrument, and making the delivery of the bill of lading the symbolical delivery of the flour. The court refers to the legal title to the flour but the entire instruction shows that the court recognized the relation existing between the banks as that of principal and agent, but stated to the jury that as to all the rest of the world the Russo-Chinese Bank was the owner of the bill of lading and the flour itself; and it was necessary for the court to give such instruction in view of the evidence and testimony that had been introduced in the case.

It was the contention of the plaintiff that the Steamship Company was liable for the loss of this flour, but the evidence showed that the bank, the holder of the legal title to the bill of lading and the flour, consented that the Steamship Company, through its agent, A. T. Short, deliver over the flour to Clarkson & Company, importers, for sale, under the promise of Clarkson & Company to account to the bank for the proceeds. The Steamship Company was perfectly justified in accepting the authority of the Russo-Chinese Bank to

release the flour, because only the holder of the bill of lading had the power to release the shipment. It seems to us that counsel have misinterpreted and misconstrued the purport and effect of the instruction of the court upon this question. The entire instruction must be read and construed together, and in the latter part of the instruction, on page 13 of counsel's brief, the court expressly stated that: "as agent for the owner it was obligated to account for the amount of the draft, to account for the security which the bill of lading constituted, and it cannot be excused from obligation to account by saying that the flour disappeared without its knowledge." And on page 14 of the brief, the court says:

"By virtue of these endorsements and transfers the *legal title* to the draft and documents and to the flour in question passed to and became vested in the Russo-Chinese Bank, and I instruct you that as a matter of law it was *in the power of* the plaintiff to handle, control, sell and dispose of such flour as its own."

The Russo-Chinese Bank was clothed with the legal title and all of the evidences of ownership and was in possession of the documents, and as against everybody except the National Bank of Commerce it had the power to handle the flour as

its own property, and had the power to direct the Steamship Company to release the flour to Clarkson & Company.

And in view of the fact that there was evidence introduced in the case showing that the bank had taken over the flour for itself, and had exercised acts of ownership over it and had caused it to be released by the Steamship Company, the instruction must be held to have been a proper exposition of the law as applied to the issues and the testimony in this case.

As between the National Bank of Commerce and the Russo-Chinese Bank the relationship of principal and agent continued to exist so far as the equitable title and the real ownership of the draft and the security was concerned, and we have no criticism to make of the language of the court in *Second National Bank v. Bank of Alma*, 138 S. W., 472, where the court said:

"By accepting for collection the draft accompanied by the bill of lading the plaintiff only became the agent of the Judge Machine Company for that purpose and it did not thereby become the true owner of the draft or of the machine which was covered by the bill of lading accompanying the draft."

This is in effect what the trial court stated in

this case: that the relation of principal and agent existed between the two banks but that the legal title to the bill of lading and the flour was vested in the Russo-Chinese Bank.

In the same case the court says:

"The collecting bank had the right to sue in its own name for any default of the defendant by reason of which any liability was incurred by it to the Judge Machine Company, and it also had the right to institute suit against the defendant for any loss which it caused by reason of a breach of duty committed by it in collecting the draft because the title thereto had been actually transferred to it, although for collection, by the Judge Machine Company."

On pages 24 and 27 of their brief counsel cite the case of *National Bank v. Merchants Bank*, 91 U. S., 92, in support of their contention that collecting banks do not acquire title to documents, or to the property represented thereby, sent it for collection. The case only refers to the real ownership and not to the legal title,—and counsel seem to rely with great confidence upon the language of the Supreme Court in that case, and have requested this court to examine the opinion in that case with great care. We join in the request that the court consider the case of *National Bank v. Merchants Bank*, 91 U. S., 92, carefully.

In the case at bar the draft was drawn upon Clarkson & Company with documents attached to be delivered only upon payment; in that case it was a time draft drawn against a consignment to order "*for collection.*" In this case the draft was drawn with the documents attached to be delivered only *upon payment.* In that case the drafts were deposited in the bank for collection and there were no instructions by the forwarding bank as to what should be done with the drafts during the time intervening between acceptance of the drafts and the date of payment; and the court held that in the absence of specific instructions the collecting bank was justified in surrendering the bill of lading at the time the draft was accepted. The court in that case clearly indicates that if the bill of lading was not intended to be delivered up upon acceptance some words should have been used to indicate the agreement of the parties; that in the absence of such agreement the presumption controlled and it was the duty of the collecting bank to deliver the documents upon acceptance of the draft. But in the case at bar the Russo-Chinese Bank was expressly notified not to deliver the bill of lading or the flour until the draft was paid, and

the evidence showed and the jury found that the Russo-Chinese Bank did in effect deliver the documents and the flour by notifying the Steamship Company to turn over the flour to Clarkson & Company, importers, and by taking the letter of guaranty, and by requiring an agreement on the part of Clarkson & Company to account for the proceeds of the sale of the flour, and by consenting affirmatively to its sale. The distinction between the case cited and the case at bar is fundamental. The questions involved and all of the circumstances and surroundings were entirely different; and in the case of *National Bank v. Merchants Bank* the court further says, that the drawer of the draft and drawee could have made an agreement had they seen fit with reference to the transaction, and in the case at bar the agreement was made that the bill of lading and the flour were not to be delivered until payment.

And in *National Bank v. Merchants Bank* the court refers to a Massachusetts case, and says:

"In *Stollenwreck v. Thatcher*, 115 Mass., 224, there were instructions to the agent to deliver the bill of lading only *on payment* of the draft, and it was held that the special agent thus instructed could not bind his principal by a delivery of the bill without such payment. Nothing was decided that is pertinent to the present case."

And in the case of *Wisconsin Bank v. Bank of British North America,* 21 Upper Canada Queen's Bench Reports, 284, the draft was sent to a collecting bank "for collection" and there were no instructions to hold the documents until the draft was paid.

Counsel also cite the case of *Gregg v. Bank of Columbia,* 52 S. E. 195, in which the court said:

"The Chicago owner of the corn had to the drafts and bills of lading invested the Bank of Columbia with legal authority to offer the corn to Miot, whether as purchaser or as agent of the plaintiff is not material. But when he refused to take it the authority of the bank was at an end, and it had no more right to sell the flour to another than if it had never had the drafts."

This language only refers to the ownership existing between the drawer and the Bank of Columbia. The case does not undertake to hold that the purchaser of the corn would not be protected in buying the same from the Bank of Columbia, which was invested with the legal title, and the court held that the Bank of Columbia in selling the corn to a third party was liable to the real owner for the highest market value thereof.

So in this case, the Russo-Chinese Bank, as the trial court correctly stated, had the power to sell the flour or dispose of it, or handle it in any

way that an owner might handle it. It had the power to direct the Steamship Company to release it and to direct Clarkson & Company to take it over and sell it and account to it for the proceeds of the sale; but by doing so it converted the flour to its own use, made it its own property and rendered itself liable for the value thereof at the highest market price to the National Bank of Commerce, and the conversion took place when the Russo-Chinese Bank gave Clarkson & Company permission to sell it and authorized the Steamship Company to deliver it to Clarkson & Company. And the value of the flour is shown by the testimony to have been considerably more than the amount of the draft, and under the authority of the case of *Gregg v. Bank of Columbia* the National Bank of Commerce would have been entitled, had it seen fit to do so, to hold the Russo-Chinese Bank accountable for the value of the flour at the highest market price, if that value exceeded the amount of the draft, and the testimony conclusively shows that it did. And the evidence showing that the Russo-Chinese Bank had converted this flour to its own use and that it was of a greater value than the amount of the draft, how can it be said with

any degree of fairness that the Russo-Chinese Bank was not indebted to the National Bank of Commerce for the amount of the remittances made in November and December, 1904, the recovery of which is sought in this action?

If we are correct in this view, and we think the authorities cited by counsel for plaintiff clearly support it, then it is manifest that any errors that might have been committed by the trial court as to the duty of the Russo-Chinese Bank to insure, store and guard the flour become wholly immaterial and harmless, and it is wholly immaterial whether the flour was insured or stored, in the light of the fact found by the jury that the Russo-Chinese Bank did take over the flour, and did by its affirmative actions allow it to be appropriated by Clarkson & Company under their promise to account for the proceeds of its sale.

Counsel contend that the sole duty of the Russo-Chinese Bank was to present the draft for acceptance and when accepted to hold the documents, and do nothing else in connection with the matter until the day of payment. And, for the sake of argument, assuming that this is the law, it is wholly inapplicable to the facts and circum-

stances surrounding this case. The Russo-Chinese Bank was not content to hold the documents in the manner that counsel for plaintiff assert that it should have held them between the day of acceptance of the draft and the day of payment; but it undertook to act as the owner of the flour, exercised dominion over it and consented that Clarkson & Company take the flour and sell it, and consented to the Steamship Company releasing it to Clarkson & Company. In all good conscience can it be seriously contended that a collecting bank has fulfilled its whole duty as a collecting agent, by simply holding the documents in its physical possession while taking such action as operates to release the goods covered by the documents to a third party, in violation of instructions not to deliver the documents and the goods represented by them until the draft had been fully paid? It would be unconscionable and monstrous to permit a collecting bank to so manipulate and handle the security by its affirmative act as to deprive the forwarding bank of the proceeds thereof; and the jury doubtless found that the testimony of Mr. Short, to the effect that the letter of guaranty so frequently referred to by us, was actually

taken by the Russo-Chinese Bank and the flour released by its affirmative act. And in view of the testimony the alleged errors of the court, if any, as to the duty of the Russo-Chinese Bank, or any collecting bank, in handling the documents or the goods between the date of acceptance and the date of payment become wholly immaterial and harmless.

On page 40 and subsequent pages of their brief counsel for plaintiff contend that the court erred in refusing to instruct the jury that the draft on Clarkson had not been paid. In our former brief we pointed out the evidence tending to show payment. There was unquestionably a conflict of testimony upon this point, but it is the function of the jury to pass upon controverted questions of fact and conflicting evidence, and this court will not undertake to determine or pass upon the weight of the testimony.

Moreover, we contend that the burden of proof was upon the plaintiff to establish that the draft had not been paid and it is within the province of the jury to have disbelieved the testimony of the plaintiff's witnesses as to the non-payment, even though such evidence was uncontradicted.

"But it seems to us that if we concede that if appellant's witnesses did testify to facts sufficient to show that Veratt was an independent contractor, and that there is nothing on the face of the record that directly contradicts him, it still would be going too far for this court to reverse the cause and direct a judgment in favor of the appellant.

"There still remains the question of the credibility of the witness. This was a question peculiarly within the province of the lower court and the jury to determine. They could observe his conduct upon the witness stand, his apparent frankness or lack of frankness, and his demeanor generally. These matters are not depicted in the record and this court is without opportunity to know how far the witness's credibility was affected by them. When, therefore, the trial judge and the jury both find that his evidence was not sufficient to overcome the case made by the respondent, this court ought not to interfere with their finding."

Johnson v. Great Northern Lumber Co., 48 Wash., 325.

On page 46 of brief of counsel for plaintiff it is contended that there is no evidence of any neglect on the part of the Port Arthur branch, and upon page 48 of their brief counsel say:

"It will be admitted at once that the Port Arthur branch did not have the right to deliver these bills of lading or permit the Steamship Company to discharge the flour without the surrender of the bills of lading. Such a step would have

been in direct violation of the letter of instructions sent by the Seattle bank. In this connection it becomes necessary to examine somewhat narrowly the procedure which it is claimed by the witness Short he was authorized by the bank to take."

When this court reads the testimony of Mr. Short, we think it will be impressed by the eminent fairness of the witness and will reach the same conclusion that the jury did as to the truth of his statement in regard to the letter of guaranty and the consent on the part of the bank to Clarkson, and the taking over of the flour and selling it by Clarkson under a promise to account to the Russo-Chinese Bank for the proceeds of the sale thereof; but even though this court should reach a contrary conclusion, still it is necessarily bound by the finding of the jury as to the credibility to be attached to the testimony of Mr. Short. There is no question as to Mr. Short clearly testifying to the action of the Russo-Chinese Bank in directing the Steamship Company to release the flour and in taking the letter of guaranty which compelled Clarkson & Company to recognize the ownership of the flour in the Russo-Chinese Bank, which acts counsel admit in the quotation from their brief

above set forth, were in violation of the instructions given by the Seattle bank to the Port Arthur branch in regard to the handling of the shipment.

The errors discussed by counsel as to the admissibility of testimony we think we have sufficiently covered in our former brief.

But even assuming that all of the testimony with regard to custom and usage was erroneous, the court must find, in view of the special finding of the jury as to the payment of the draft that such errors were wholly immaterial. For if the draft was in fact paid, or if the jury found that there was not sufficient evidence to show that it was not paid by Clarkson & Company, then what possible materiality can there be in contending that the court erred in admitting or rejecting testimony as to custom or usage?

On pages 56 and 57 of their brief counsel for plaintiff refer to the testimony of Davidson, and contend that Davidson was not referring to the flour shipped on the Steamship "Hyades" but was referring to the flour later shipped on the Steamship "Pleiades."

It is true that Davidson was somewhat con-

fused as to what vessel brought the shipment securing the draft in question, but he stated that he did not know whether it was the "Hyades" or the "Pleiades" but that he referred to the vessel that arrived at Port Arthur about February 9th. He also stated in his testimony that it had been seven or eight years since the transaction occurred and that he was not sure as to the vessel.

But Davidson was clearly referring—and his testimony shows it—to the vessel that brought the flour securing the draft in controversy. Moreover, the evidence of Mr. Short clears the matter up conclusively. Short testified that there were only 6000 to 8000 sacks of flour in Clarkson's warehouse on the arrival of the "Hyades" containing about 36,000 sacks. The "Pleiades," according to Short's testimony arrived at Port Arthur about the 9th of February and only unloaded about 1500 sacks. The balance of the flour on the "Pleiades" was taken away from Port Arthur to Che-foo and there unloaded. Short left Port Arthur on the "Pleiades" when she sailed shortly after the 9th of February, and it is clear that Davidson could not have had in mind the Steamship "Pleiades"

but did have in mind the "Hyades" which was the vessel that brought the flour that is now in controversy. Moreover, Davidson's testimony is to the effect that the flour that came on the vessel he had in mind was sold in part by him to Ginsburg—or that he agreed to sell the same to Ginsburg. It seems to us that the attempt to discredit Davidson's testimony by this confusion of the two steamers or by his mistake as to a date is altogether trivial and unworthy of consideration by this court, especially in view of the fact that the jury heard the testimony and by their verdict show that they did not discredit Davidson's testimony.

Paragraph 2 of said page 60 predicates an error upon the refusal of the court to give an instruction that the Seattle bank was entitled to recover only the actual damages suffered by reason of negligence, and contend that the instruction requested was pertinent with reference to the permission given Short by the manager of the bank to take over the flour and further contend that there was no showing that any action was ever taken under the permission and no flour ever disposed of under it.

We can hardly understand the purport of the

contention of counsel in view of the evidence. The uncontradicted testimony shows that flour was worth about two and one-half roubles per sack and that by reason of the consent given Clarkson & Company to take over and sell the flour, the flour which was held as security for the draft in question disappeared and the evidence shows that this flour, or a considerable part of it, was sold to Ginsburg; that the Port Arthur bank knew of the selling to Ginsburg, succeeded in diverting the sale made by Davidson to Ginsburg; co-operated with Clarkson in selling the flour to Ginsburg at an increased price and that the proceeds of the flour sold to Ginsburg, to the extent of 67,000 roubles, were actually received by the Port Arthur bank. Manifestly Clarkson & Company would not have sold the flour without the permission of the bank and the damage and injury of the Seattle bank clearly resulted from this permission so given and from the affirmative action of the Port Arthur bank.

We fail to see how it can be seriously contended that there was no proof of acting by Clarkson & Company under the letter of guaranty and the permission given them to take over the flour from the Steamship Company.

On page 61 of the brief for plaintiff in error counsel complain of the refusal of the court to give the instruction requested, to the effect that there was no necessity on the part of the Port Arthur bank to notify the defendant that Clarkson & Company were the agents of the Steamship Company, if the Centennial Mill Company, or its representative, already knew that fact.

Such instruction was wholly immaterial and was in no way pertinent to the facts in the case. Whether the Centennial Mill Company knew that Clarkson was the agent of the Steamship Company or not, it had the right to assume that the Steamship Company would fulfill its duty and hold the flour in accordance with the terms of the bills of lading. But the uncontradicted testimony shows—or at least the testimony of Mr. Short shows—that the Port Arthur bank affirmatively consented to the action of the Steamship Company in surrendering the flour at a time when the Port Arthur bank was invested with the legal title to the bills of lading and had such bills of lading in its custody and possession.

On pages 61, 62 and 63 of the brief of counsel for the plaintiff in error it is contended that

owing to the fact that the Centennial Mill Company had paid to the National Bank of Commerce the amount of the original draft and that the National Bank of Commerce, when it received the remittance sued for in this action in November and December, 1904, paid the same over to the Mill Company, the National Bank of Commerce was in no way interested in the transaction and could not defend the action brought against it for the recovery of this money. It is further contended that the Centennial Mill Company is the real party in interest and that if anyone has a claim against the Port Arthur bank it is the Centennial Mill Company and not the National Bank of Commerce.

In making this contention counsel must have overlooked Section 180 of 1 Bal. & Rem. Code, which is as follows:

"An executor or administrator or guardian of a minor or person of unsound mind, a trustee of an express trust, or a person authorized by statute, may sue without joining the person for whose benefit the suit is prosecuted. A trustee of an express trust, within the meaning of this section, shall be construed to include a person with whom or in whose name a contract is made for the benefit of another."

The Centennial Mill Company vested in the National Bank of Commerce the legal title to the draft, the documents and the shipment itself and it undertook to carry out the business of the Mill Company in the collection of the draft and in the handling of the entire transaction. It was acting as a trustee or agent for the Mill Company, and under the statute it seems to us to be the only person who could have maintained an action for the damages in question.

It is possible, as the National Bank of Commerce was acting as the trustee or agent of the Centennial Mill Company, that any defense the Port Arthur bank might have had against the Mill Company could have been asserted against the National Bank of Commerce. But there is no such question involved in this controversy. If this be true, then the converse ought to follow—that the National Bank of Commerce, acting for the Centennial Mill Company, ought to be permitted to set up any defense against the Port Arthur bank which the Mill Company might have interposed. In fact the case of *Second National Bank v. Bank of Alma*, 138 S. W., 474, cited by counsel for the plaintiff in effect upholds the right of the

defendant to interpose any defense that was available to the Mill Company.

The real beneficial owner of the flour was of course the Centennial Mill Company. The National Bank of Commerce was its agent. The Seattle bank undertook to handle the shipment as the agent of the Centennial Mill Company. The fact that the Mill Company could not proceed against the Seattle bank for the negligence of the Port Arthur bank affords no reason for holding that the Seattle bank, the agent of the Mill Company, cannot avail itself of the defense of negligence on the part of the Port Arthur bank in protecting the interests of the Mill Company. The trustee of an express trust ought to be permitted to avail itself of any defenses that are available to the beneficiaries under the trust.

Assuming that the draft for $36,194.80 was in fact paid by Clarkson & Comany to the Port Arthur bank and that it has wrongfully retained such money, and had it in its possession at the time the remittances were made by it to the Seattle bank in November and December, 1904, even under such circumstances, if counsel's contention is correct, the National Bank of Commerce could not

interpose such defense, because—as counsel say—the Centennial Mill Company had relieved the National Bank of Commerce of liability for the wrongful or negligent acts of the Port Arthur branch. Such a holding by this court would seem to be most unconscionable and unreasonable.

We fail to see upon what principle of law or fair dealing the defendant should be required to refund the money in controversy to the plaintiff and then sue the Mill Company to recover it back, when it manifestly appears, as the lower court instructed the jury, that the National Bank of Commerce was acting as the agent or trustee of an express trust of which the Centennial Mill Company was the beneficiary.

"A trustee may set up in his character as trustee any defense which the *cestuis que trustent*, were they in person defending the action might urge in their own behalf."

39 Cyc., 450.

Wagnon v. Pease, 30 S. E., 895.

Respectfully submitted,

KERR & McCORD,

Attorneys for Defendant in Error.

No. 2182

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

RUSSO-CHINESE BANK (a corporation),
Plaintiff in Error,

vs.

THE NATIONAL BANK OF COMMERCE OF SEATTLE, WASHINGTON,
Defendant in Error.

PETITION FOR REHEARING.

To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Plaintiff in error respectfully requests a rehearing in this case.

This court, in its opinion affirming the judgment, has discussed but a single phase of the case. It has concluded "that the special verdict of the jury finding that the Port Arthur branch of the Russo-Chinese Bank did receive payment of the draft dated December 11, 1903" is conclusive, and that

there is at least some evidence to support such verdict.

In our brief, we had more particularly discussed the instructions given by the trial court concerning the obligations and relations of the Port Arthur branch to the consignment of flour, for the reason that it seemed that these instructions were fundamental and necessarily must control any verdict, whether general or special, of the jury; and that if correct, they were tantamount to a direction to find for the defendant; and that if incorrect, they must necessarily result in a reversal because upon a subject matter necessarily and directly germane to the relations between the parties and of necessity underlying and controlling any verdict that might be rendered upon the facts.

For this reason we now take the liberty of first referring more at length to the testimony which may or may not support this special verdict, and shall next urge that certain instructions of the court, if erroneous, must necessitate a reversal, notwithstanding the special verdict.

I.

WE STILL URGE THAT THERE IS NO LEGITIMATE EVIDENCE THAT THE DRAFT IN QUESTION HAS EVER BEEN PAID IN WHOLE OR IN PART. UPON THE CONTRARY, THAT THE EVIDENCE IS CLEAR AND CONCLUSIVE THAT IT HAS NEVER BEEN PAID.

We first give a copy of the first portion of the court's opinion on this subject to the end that the

court may consider it in detail with more visual convenience.

"We find in the evidence of the defendant's witnesses Davidson and Short, and in that of Clarkson, as well as in the circumstances of the case, much evidence upon which the special verdict might well have been based. The record shows that there had been many other similar drafts, accompanied by similar documents, sent by the Seattle bank to the Port Arthur bank for flour sold by the Centennial Mill Company, and that the plaintiff bank was familiar with the business of Clarkson & Co., and, indeed, was mainly instrumental in the establishment of that firm at Port Arthur. Clarkson & Co. also had a place of business at Vladivostok, where its main office was—Davidson during most of the times in question being its manager at Port Arthur, and Short its assistant manager there, a Mr. Ofsiankin being during all of the times in question the manager of the plaintiff bank at Port Arthur, and subsequently, and at the time of the taking of the testimony in this case, being the manager of the Vladivostok branch of the plaintiff in error. The record shows that Clarkson & Co. were the agents of the steamship company that carried the flour in question from Seattle to Port Arthur and were also importers, merchants, and insurance agents, and had one of the three warehouses at Port Arthur, all of which facts were well known to the Port Arthur bank. The flour in question was carried to Port Arthur by the ship Hyades, which reached there about the middle of January, 1904. The evidence also shows that Clarkson & Co. were large customers of the bank. The succeeding ship of the steamship company, also carrying flour among other things, reached Port Arthur about the 7th of Feb-

ruary, 1904. Short testified, among other things, that when the Hyades arrived with the 35,312 quarter-sacks of flour in question, there were but from six to eight thousand sacks in Clarkson & Co.'s warehouse, and that when that shipment arrived he went to the Port Arthur bank on behalf of Clarkson & Co. to accept the draft drawn for the purchase price of it, and did so; that when he accepted the draft Mr. Ofsiankin, on behalf of the bank, authorized Clarkson & Co. to take immediate possession of the flour and sell it, and that he, Short, on behalf of that firm, gave the bank what he designates as a 'letter of guaranty' and what Davidson in his deposition designates as one of 'hypothecation', recognizing the flour as the property of the bank until paid for and agreeing to pay over to the bank the proceeds thereof until full payment was made; that the letter was 'the regular form of bank guaranty; it was a printed form', said the witness. And both Short and Davidson testified that what was done in the matter of the shipment here in question was in accordance with a long-established custom between the Port Arthur bank and Clarkson & Co.—Short testifying that 'from the year 1900 the same rule existed. We always gave the bank a letter of guaranty against—a letter of guaranty to take delivery of the cargo and the cargo belonged to them until it was paid for, and we sold it out and deposited the money in the bank from time to time as Clarkson & Co. got it in'. Davidson in his deposition corroborates the testimony of Short in that regard, and it is a most significant circumstance that although it appears from the evidence that during the times it was being taken Mr. Ofsiankin was the manager of the plaintiff in error's bank at Vladivostok he was not called to contradict the testimony of Short and Davidson; nor did the plaintiff in

> error produce the written agreement between the parties delivered to the bank according to the testimony of those witnesses, nor in any way account for it. Short testified that upon the acceptance by Clarkson & Co. of the draft in question and the delivery by that firm to the Port Arthur bank of the documents mentioned, *Clarkson & Co. took possession of the 35,312 quarter-sacks of flour and that they thereupon commenced selling it and paying into the bank the proceeds thereof is a fair inference from his testimony as well as that of Davidson.*"

We have italicized the concluding portion of this opinion as more particularly the portion thereof which comments upon testimony tending to show that, in the language of the special verdict, the Port Arthur branch did receive payment of the draft dated December 11, 1903, on account of which the plaintiff made the remittance to the defendant alleged in the complaint.

Examining now the foregoing statement more in detail, it is first said that many other similar drafts, accompanied by similar documents, had been sent by the Seattle bank to the Port Arthur bank, and that the plaintiff bank was familiar with the business of Clarkson & Co.; that Clarkson & Co. had its main office in Vladivostok and were large customers of the plaintiff bank.

Assuming the truth of these statements, they cannot show of themselves that this particular draft was paid to the Port Arthur branch. We may assume that many other similar drafts had been han-

dled by the parties; that Clarkson & Co. were the agents of the steamship company; and that that fact was known to the Port Arthur branch (although this latter fact is positively denied by the bank's officials). Yet, nevertheless, there is in none of these facts *alone* anything upon which the special verdict could be predicated or upheld.

The testimony of Short is then mentioned that when he accepted the draft, Ofsiankin, on behalf of the bank, authorized Clarkson & Co. to take immediate possession of the flour and sell it, and that a letter of guaranty was given in accordance with the usual custom.

But we fail to find in this evidence, assuming its truth, anything to show that the draft was paid. Assuming that the bank did make the somewhat extraordinary arrangement of permitting Clarkson & Co. to take the flour without payment of the draft, such action would, without doubt, have been negligence on the part of the bank, for the consequences of which it would be responsible. But it would not have been a *payment* of this particular draft and cannot of itself make possible this special verdict of the jury.

We now in this connection, for the first time, draw this court's attention to another instruction given by the trial court as follows (p. 256):

> "If you find from the evidence in this case that plaintiff permitted Clarkson Company to take over the flour under such an arrangement as the defendant claims with the stipulation

that the plaintiff was the owner of the flour and with the agreement that Clarkson & Company would account to the plaintiff for the proceeds of the sale of the flour, then I instruct you that such action on the part of the plaintiff constitutes in law a payment of the draft in question and the plaintiff cannot recover and your verdict must be for the defendant."

This instruction was specifically and fully excepted to:

"We except to the instruction to the effect that if plaintiff permitted Clarkson & Company to take over the flour under an arrangement between the plaintiff and Clarkson & Company which would recognize by Clarkson & Company the ownership of the flour by the plaintiff and the right of Clarkson & Company to sell the flour, that by such agreement and action on the part of the plaintiff there became in law a payment of the draft in question and that the plaintiff cannot recover, and we except to each and every part of said instruction, which is numbered 11 of defendant's proposed instructions" (pp. 232-8).

And also to the refusal of the court to give the following instruction:

"If you shall believe that the Russo-Chinese Bank was negligent in any respect in regard to its duties in the premises, then I charge you that it is liable, if at all, only for such actual damages as were directly suffered by the Seattle Bank by reason of such negligence. That is, even if you believe that it was the duty of the plaintiff to insure and store this flour and take it out of the control of Clarkson & Company, but that nevertheless if plaintiff

had done these things, the flour would have been lost or destroyed by reason of the war conditions at Port Arthur, then I instruct you that such negligence cannot be considered by you, but that plaintiff is entitled to recover regardless of such negligence" (p. 217).

This instruction of the trial court would seem to conclusively demonstrate that the special verdict of the jury cannot be divorced from the instructions of the court, but that the two are inseparably intermingled and must be read together; so that if the instructions are erroneous, the special verdict must fall. For by these instructions the jury were told that if plaintiff gave Clarkson & Co. permission to take over the flour, that such act alone constituted *a payment of the draft.*

If these arrangements were made by the bank, it would have been in violation of their instructions, and they would have been liable to the Seattle bank for the consequences of such act, but it does by no means follow that such act would as a matter of law have been a *payment of the draft,* because although the arrangements were made it might follow that none of this flour was actually sold, but that it remained in the warehouse, and, therefore, that the Seattle bank had not actually suffered any damages by reason of such negligence on the part of the Port Arthur branch. It is submitted that the instruction requested and refused, to the effect that the Russo-Chinese Bank if negligent was only liable for such actual damages as were suffered by reason of such negligence, is the un-

doubted law. Yet by the instructions given the jury were told that by this single act of negligence the Russo-Chinese Bank was at once liable for the full amount of the draft, because the jury were instructed to consider such negligent act as a payment in full. We discuss this instruction more fully hereafter.

We shall endeavor to show to this court that there is not any evidence that this flour was ever sold by Clarkson & Co. or that the Russo-Chinese Bank ever received any money for it. Assume that it had been admitted that the Russo-Chinese Bank had made this arrangement, could it have been held liable in any greater damages for such negligent act than were actually suffered by its correspondent? Yet to support these instructions of the court it must be held that immediately upon making such unauthorized arrangement, the Russo-Chinese Bank became at once responsible to the Seattle Bank for the full amount of the draft, although it might happen that the arrangement was never consummated; no flour removed from the warehouse by Clarkson & Co.; and not a dollar received by the Russo-Chinese Bank therefor.

In reviewing the preceding excerpt from the court's opinion, we have now endeavored to show that the evidence referred to up to the sentence given in italics was not sufficient, even by way of inference, to justify this special verdict. It is not stated in the opinion, nor is it claimed by

counsel for defendant in error, that there is any direct testimony that this draft was ever paid in money in whole or in part. The only argument is one of inference. It is said that there was a long-established custom by which a letter of guaranty was given, and from that inference the conclusion is reached that this particular draft was paid.

We urge that all this testimony, concerning the established custom, to be of any effect whatever, must at least be connected and identified with the particular draft in question.

When this evidence concerning the custom existing between the parties was offered, the plaintiff below made strenuous objection upon the ground that it was not shown that the custom applied to a case similar to the present one.

Thus when this question first arose in the deposition of Davidson, the following objections were made (p. 177):

> "Q. What is the custom of bankers with reference to presenting drafts for acceptance?
>
> "COUNSEL FOR PLAINTIFF. Now, may it please the court, we desire to object to that question as incompetent, irrelevant and immaterial, upon two grounds: First, that there is no reason for the court to now invoke any custom or usage, because the contract in this case is clear and specific and direct; in other words, there is no necessity for an implied contract, because there is an express one; and upon the second ground that the question does not refer to the conditions prevailing in this case, because it does not ask with reference to presenting drafts

for acceptance which are sent as against payment, but it asks generally as to drafts for acceptance. Now, of course there may be one custom of bankers concerning one sort of a draft and another concerning the other kind of a draft, but to invoke now a custom generally and say that it applies to this case is, we submit, utterly incompetent, irrelevant and immaterial."

This objection was overruled and exception allowed.

The following question was then asked:

"Q. What is the established custom among bankers at Oriental ports with reference to the handling of drafts with bills of lading and documents attached, when the drafts are in their hands for collection?

"COUNSEL FOR PLAINTIFF. Your Honor will allow me the same objection as that made to the previous one, and the third point that it is not pleaded in the pleadings."

This objection being overruled, and exception allowed, the witness answered:

"A. The established custom among bankers in the Orient is not to part with the documents until the drafts have been paid, if the documents are only deliverable against payment. It often happens, however, that the firm upon which the draft is drawn has a good credit with the bank and under those circumstances the bank delivers the documents against acceptance and thereby accepts responsibility."

A motion to strike out that portion of the foregoing answer beginning with the words, "It often

happens'' being denied, the next question was (p. 179):

> "Q. What is the custom of the Russo-Chinese Bank upon the arrival of shipments where drafts with bills of lading are attached are in their hands for collection?"

to which the following objection was made by counsel for plaintiff (p. 179):

> "COUNSEL FOR PLAINTIFF. We object to any evidence of this custom on the grounds previously stated and upon the further ground that there is no pleading whatever here concerning this matter, therefore it is incompetent, irrelevant and immaterial. There is no statement in the question as to the character of the draft referred to, whether it was a draft as against acceptance or whether it was a draft as against payment. For example, the question is this, Your Honor: 'What is the custom of the Russo-Chinese Bank upon the arrival of shipments where drafts with bills of lading are attached are in their hands for collection'? Now there are two kinds of drafts. One is a draft which authorizes them to turn the bill of lading over when it is accepted; that is one thing. The other is where the draft says they shall retain the bills of lading until it is paid; that is another thing. But now this question is asked and the answer is made as if it were a general statement."

This objection being overruled, the witness answered (p. 180):

> "A. The custom of the Russo-Chinese Bank at Port Arthur was to see that the cargo was stored and insured and the managers of the Russo-Chinese Bank have frequently come to the office of Clarkson & Company to ascertain

> if certain cargo was properly stored and have taken out fire insurance with some of the fire insurance companies for which Clarkson & Company acted as agents, on such cargo."

The witness subsequently testified at length that it was the bank's custom to deliver the bills of lading to Clarkson & Co. when the draft was *accepted.* We submit that the foregoing objections and exceptions clearly placed before the court the position of the plaintiff below, which was that before any evidence concerning the delivery of bills of lading of the cargoes in other cases was given, it must have been shown that the witness was testifying to drafts accompanied by documents deliverable against *payment,* and not against acceptance; that in the absence of this fundamental ground of similarity the evidence should not have been admitted.

The rulings and this evidence becomes of especial significance because of the position taken by this court in its opinion. It largely finds support for the special verdict from the custom that had prevailed in previous cases. The jury could not know from Davidson's testimony that this custom was followed when the bank received drafts with instructions to hold the documents against payment.

It is said by the court that "Davidson in his deposition corroborates the testimony of Short" as to the giving of the letter of guaranty. But there is a difference in the testimony of these two witnesses, a difference to which the attention

of the two witnesses was drawn so clearly that it cannot admit of doubt. Davidson testified that the custom was for the Russo-Chinese Bank to deliver the bills of lading to Clarkson & Co. when the draft was *accepted*. He testified upon direct examination (p. 183):

> "Q. When Clarkson & Company were allowed to take delivery of the cargo under the circumstances you have described, who held the bills of lading?
>
> "A. The custom was for the bank, the Russo-Chinese Bank, to deliver the bills of lading to Clarkson & Company when Clarkson & Company accepted the draft.
>
> "Q. For how long was this practice kept up?
>
> "A. This custom was in practice from the time I took charge of the firm of Clarkson & Company in Port Arthur until I left."

And upon cross-examination he testified (p. 209):

> "Q. If, in answer to the direct interrogatories, you have stated that Clarkson & Company were allowed to take delivery of cargoes without production of the bill of lading, state if, in each case payment had not first been made to the Russo-Chinese Bank for the goods, and also state whether or not such custom prevailed only as related to bills of lading which the Russo-Chinese Bank has sent to Harbin for safe-keeping?
>
> "A. I have not stated that Clarkson & Company were allowed to take delivery of cargoes without production of the bill of lading."

Now we know positively in the present case that the bills of lading were not delivered to Clarkson & Co., or anyone else, by the Port Arthur

branch, for the reason that they were produced in court by the plaintiff, and are now in the files of that court; so that the custom or practice to which Davidson testified could not have been followed in the present case.

Short testified (p. 141):

> "Q. Well, when was this letter of guaranty, containing the provisions that you have named, executed with reference to the acceptance?
> "A. At the time of the acceptance of the draft.
> "Q. What became of the documents?
> "A. The documents were left at the bank. Oftentimes we took the documents; others we left them there.
> "Q. What did you do in this case?
> "A. They were left there."

We find, therefore, that instead of there being corroboration there is contrariety of opinion between these two witnesses as to the custom that existed.

It is next said in the opinion that it is a significant circumstance that Mr. Ofsiankin was not called to contradict the testimony of Short and Davidson. To this our only reply can be that this trial took place in Seattle, and that Mr. Ofsiankin was in Vladivostok (p. 172); that there was nothing in the pleadings in this case to put the plaintiff upon notice that any such custom, testified to by either Short or Davidson, was to be relied upon. To the contrary, the only usages pleaded in the amended answer are (p. 13): (1) That under the custom

among bankers at Oriental ports, it became the duty of the plaintiff to present said draft for acceptance upon its arrival, and (2) that under the custom of bankers, it became the duty of the plaintiff to look after, protect and care for the flour.

There was, therefore, nothing in the pleadings to the effect that defendant would rely upon a custom or usage prevailing between Clarkson & Co. and the Port Arthur branch by which Clarkson was permitted to have possession of flour upon giving a letter of guaranty and, as noted, plaintiff upon the introduction of this testimony made objection upon this specific ground. The absence of Ofsiankin at the trial was, of course, plaintiff's misfortune, but in the absence of any such pleading or other showing from the defendant, the failure to call him as a witness to contradict the testimony of Short and Davidson should not, we submit under the circumstances, be held as an admission on the part of the plaintiff that this testimony is true.

Comment is also made that the plaintiff did not produce the written agreement of guaranty claimed to have been delivered to the Russo-Chinese Bank. The plaintiff has denied that it ever received any such document. Thus Friedberg testified (p. 33):

> "Neither the bank at Port Arthur nor myself ever obtained possession of the shipment of flour. Nor did the bank at Port Arthur take this flour into custody or control or sell it to the Russian Government, or to one Gins-

burg, a representative of the Russian Government. Nor did I or the Russo-Chinese Bank at Port Arthur surrender the draft or the documents attached thereto to the agent of the Steamship Co. These documents are in the possession of the Russo-Chinese Bank up to this date. The bank never got possession of the flour and never transferred it to Ginsburg. The bank never realized any sum from Ginsburg for this flour; never sold or delivered it to Ginsburg; nor do its books show any entries regarding such sale."

The witness Bock testified (p. 68) that the bank at St. Petersburg had had correspondence with the National Bank of Commerce in regard to the draft transaction, and he said that he annexed "all the letters and telegrams received by the bank at St. Petersburg from the National Bank of Commerce of Seattle and the copies of the replies". This so-called guaranty is not one of them. (We do not find that there is any specific question in the record calling for all the correspondence between Clarkson & Co. and the bank.) At the trial, plaintiff's counsel stated (p. 140) that plaintiff did not have this document.

Bearing upon the failure of the plaintiff to produce this so-called letter of guaranty or the witness Ofsiankin at the trial, reference should be made to the deposition of the witness Clarkson (pp. 109-118). This deposition was taken long before the first trial and read at the first trial. Clarkson was then engaged in litigation with the Russo-Chinese Bank and not a friendly witness;

and in this deposition he not only states nothing concerning these so-called letters of guaranty, but on the contrary denies that any such custom existed between his firm and the Russo-Chinese Bank. He also stated (p. 111) that all the books and documents pertaining to the Port Arthur office were lost during the siege of Port Arthur. Concerning the method of doing business by Clarkson & Co. at Port Arthur he said (p. 110):

> "When a steamer was unloaded by ourselves boat notes were given to the steamer and the goods held at the warehouse until parties presented the bills of lading when the goods were turned over to them after all charges to date had been paid."

and at page 113:

> "Clarkson & Co. always either paid the drafts before taking delivery of the flour as merchants or else made arrangements with the bank by which the bank would turn over the documents to us."

At the time of the second trial, therefore, we submit that it could hardly be considered negligence on the part of the plaintiff in failing to have Ofsiankin present because it already had the depositions of the men who had this draft transaction particularly in charge at Port Arthur, and who were familiar with and produced the books of the bank. There was, also on file, as noted, a direct statement from Clarkson, who certainly must have been as familiar with the method of transacting his own business as anyone else, to the effect that

he never permitted cargoes to be released from the possession of the steamship company without the production of the bills of lading; that plaintiff had these bills of lading and, naturally, was justified in believing that the flour had not been delivered.

If any presumption is to be indulged for the non-production of this document or a copy, it would seem that the consequences militate against the defendant and not the plaintiff, for it will be noted that counsel for defendant stated at the trial that he had demanded the *original* over a year before, and knew that plaintiff would not produce it because it denied its existence. Nevertheless, no copy was produced, nor were the witnesses Short and Davidson able to give anything more than the baldest description of the document. The plaintiff did produce the bills of lading. The presumption, therefore, was that the bank had not permitted the flour to be taken over by Clarkson without payment. We submit that the plaintiff was entitled to rely upon such a presumption, and that it was the business of the defendant, if it claimed that this letter of guaranty existed, to produce a copy thereof, and if a copy of this particular letter was not obtainable, then the original or copies of some of the other letters which it was stated had been given in the past.

We now refer to the concluding sentence of the preceding excerpt of the opinion, to the effect that Short testified that Clarkson & Co. took possession of the 35,312 quarter-sacks of flour, and that the fair

inference from his testimony and that of Davidson is that Clarkson & Co. thereupon commenced selling the flour and paying into the bank the proceeds thereof.

We would here urge that the question as to whether or not this draft was actually paid cannot be settled by "inference". If it was paid in whole or in part, the production of evidence showing that fact was easily obtainable either from the principal debtor, Clarkson, personally, the testimony of an employee of Clarkson & Co., or the books of the Russo-Chinese Bank. All of such avenues of testimony were open to the defendant below.

Yet such direct testimony as was attempted to be shown, instead of showing any payment of the draft, is quite to the contrary effect.

This draft matured on April 30, 1904, and was payable May 2, 1904.

Davidson testified (p. 197):

> "I left Port Arthur on the 17th of February, 1904."

and (p. 198):

> "After I left Port Arthur on the 17th of February, 1904, I had no connection whatever with the firm of Clarkson & Co. or their business."

And on January 30, 1904, Clarkson wrote a letter to Davidson dismissing him from his employment.

Short testified (p. 137) that he remained with Clarkson & Co. until February 4, 1904.

Neither of these witnesses, therefore, had any connection with Clarkson & Co. at the time this draft matured, or for more than two months prior to such maturity.

Concerning now any direct testimony as to whether or not Clarkson, as the opinion states, "commenced selling the flour", we refer first to the testimony of Short (p. 159):

> "Q. Now, of your own knowledge, Mr. Short, can you positively state that you know whether any of this flour from the 'Hyades' was sold while you were there?
> "A. From the 'Hyades'?
> "Q. Yes.
> "A. I can—no, I can't.
> "Q. You cannot?
> "A. I cannot state positively—the 'Hyades'.
> "Q. (Mr. McCord). What was that question?
> "A. If I state positively that any of the flour from the 'Hyades' was actually sold up to the time I left.
> "Q (Mr. Gregory). The facts were that there was a great deal of flour in the warehouse, was there not?
> "A. There was from six to eight thousand sacks, I figure.
> "Q. And whether or not the 8000 sacks that you say were sold was a part of the 'Hyades' flour or not you have no knowledge, have you?
> "A. I have no knowledge.
> "Q. No, no knowledge at all, and you are not able to state now here, are you, whether or not those 8000 sacks were paid for or were sold?
> "A. Well, I would say that up to the time I left there they were not paid for.

"Q. Yes, they were not paid for.

"A. In fact I am positive, because it was sold through the Comprador or through the general accounts, which would not have been collectible in the—with the general accounts until the first of the following month and with the Chinese just as he collected it in from the Chinese who were subcontractors building the forts and roads.

"Q. *Do you know what became of the 'Hyades' flour?*

"A. The 'Hyades' flour?

"Q. Yes.

"A. *I don't.*

"Q. *Do you know whatever became of a single sack of it?*

"A. *No,* nothing other than what I have heard them testify to.

"Q. Yes, but of your own knowledge, I mean?

"A. No.

"Q. You don't know anything about that at all?

"A. I know that was in the warehouse of Clarkson & Company.

"Q. *Whether or not it was ever delivered out of the warehouse to anybody you can't say?*

"A. *I cannot say.*

"Q. *Whether or not the bank ever got any money for the draft you cannot say?*

"A. No, I cannot say.

"Q. Yes.

"A. *I don't know.*"

Davidson testified on cross-examination (p. 210):

"Q. If you shall, in answer to the fifty-seventh direct interrogatory, state that you know that the draft in question was paid, then state the exact date when the same was paid and by whom, giving the manner of payment,

whether by check or by cash. If by check, state on what bank, the same was drawn, and, if possible, attach a copy thereof to this deposition?

"A. I have not made any such statement in answer to direct interrogatory number fifty-seven."

and (p. 212):

"Q. Did you ever, prior to the commencement of this suit in April, 1908, inform the National Bank of Commerce of Seattle, or any of its officers, that the draft dated December 11th, 1903, for Thirty-six thousand one hundred and ninety-four and 80/100 Dollars ($36,194.80) had been paid by Clarkson & Company to the Russo-Chinese Bank? If this information was given by letter, attach to this deposition copies thereof, and if oral, state as precisely as possible the terms of such communication?

"A. I did not."

and upon direct examination (p. 194):

"Q. Do you know whether this draft drawn by the Centennial Mill Company and in the hands of the branch of the Russo-Chinese Bank at Port Arthur covering this shipment of flour was ever actually paid?

"A. No; I have no knowledge, definite knowledge, that it ever was paid since I left Port Arthur long before it fell due."

These two witnesses, Davidson and Short, were the only witnesses whose testimony was either read or given in behalf of the defendant or who say anything about the flour for which the draft in question was given.

We now quote from the remaining portion of the court's opinion on this subject:

> "It appears from the latter's testimony that by reason of orders of the Russian military authorities he was compelled to leave Port Arthur and did so on the 17th of February, 1904. Being asked on his direct examination when the last shipment of flour from the Centennial Mill Company to Clarkson & Co. arrived at Port Arthur, he answered that it arrived there about the 8th of February, 1904, but that he could not state positively as he was not there at the time; and being asked on what steamer that flour arrived at Port Arthur, answered: 'On one of the steamers operated by the Boston Steamship Company or the Boston Towboat Company, either the Hyades or the Pleiades'; and being asked as to the quantity of flour that arrived by the steamer so referred to by him, answered: 'Between thirty-five and forty thousand sacks'. In his subsequent testimony on both direct and cross-examination the witness was evidently quite confident that the steamer that brought that flour was the Pleiades, but the flour itself, the witness distinctly testified, was sold by him before leaving Port Arthur to the firm of Ginsburg & Co., which he testified was a large Russian firm doing an extensive business with the Port Arthur bank and with its principal place of business at that place, and which sale he testified he had to make in order to protect Clarkson & Co. against the war conditions then prevailing. His testimony is, in part, that he arranged with Ginsburg & Co. to pay a part of the money for which he sold the flour into the Port Arthur bank and to take a draft from that company on Shanghai in his favor, which he intended to pay into Clarkson & Co.'s branch at that place; and that he

took the head of the firm, Ginsburg, to the Port Arthur bank and explained to the manager of that bank the terms of the sale, to which he agreed.

"Short testified that the Pleiades arrived at Port Arthur about the 7th of February, and that he himself left there on board of that vessel, and that not more than 1500 or 2000 sacks of flour were landed at Port Arthur from that ship; so that the jury might well have concluded that the thirty-five or forty thousand sacks of flour which Davidson thought were brought by the Pleiades was the consignment of flour that the Hyades carried to that port a few weeks before. As a matter of course that, and all other inconsistencies in the testimony of the various witnesses, as well as their veracity, were matters for the determination of the jury, in the light of all of the facts and circumstances of the case. Moreover, there was testimony tending to show that from the 1st of January, 1904, to November 23d of the same year, Clarkson & Co. paid into the Port Arthur bank 126,928 rubles and 97 kopeks."

This portion of the opinion is principally concerned with what we have called the Ginsburg transaction. It will be seen by the record that the plaintiff, from the time that this transaction was first mentioned, persistently, both by motions to strike out and objections to questions, insisted that this Ginsburg consignment of flour had nothing to do with the draft in question, because it was flour which arrived at Port Arthur ex "Pleiades", whereas the flour in question was sent ex "Hyades".

Here, also, fortunately, the record is clear and precise so that there can be no possible question con-

cerning it. We first have the stipulation between the parties (p. 122) as follows:

> "It may be stipulated between the parties that the steamship 'Hyades' arrived at Port Arthur on January 16, 1904, and that she left Port Arthur for her homeward voyage on January 22nd, 1904.
>
> "It may be also stipulated that the log book of the steamship 'Pleiades' will show that she arrived at Port Arthur on February 7, 1904, and that she left Port Arthur for her homeward voyage on February 13, 1904."

The only witness for defendant that has mentioned this Ginsburg transaction is Davidson, and we now offer extracts from his testimony to show that he at all times, in speaking of the Ginsburg flour, definitely confined it to the cargo of the ship that arrived at Port Arthur on February 7, 1904; that is the "Pleiades". The first mention that he makes of the subject is at page 186, where he said:

> "On or about the 15th day of February, 1904, the Russo-Chinese bank did consent to the sale of the flour ex steamship 'Hyades', if that is the name of the steamer that arrived at Port Arthur on or about the 8th of February, 1904."

We here emphasize the fact that the witness states that he is in doubt as to the name of the steamer, and that he identifies it only from its date of arrival. He was positive only as to the date of arrival. We know from the stipulation that the "Hyades", carrying the cargo of flour in question, arrived at Port Arthur on January 16th, and left there on January 22nd, so that nearly a month had

elapsed after the discharge of the "Hyades" before this alleged consent of the Russo-Chinese Bank was given. But, as noted, the witness states that this consent was with reference to the cargo of the steamer that arrived on or about the 8th of February, 1904. Furthermore, Short testified that he, personally, had charge of the acceptance of the earlier draft, ex "Hyades", and, therefore, Davidson could not, as he says (p. 186), have personally notified the, at that time, manager of the Port Arthur branch of the Russo-Chinese Bank that *he* had made arrangements with the Russian firm by the name of Ginsburg & Co. to take over the flour and pay the draft, if this flour and draft refer to the ones in suit. Short handled for Clarkson & Co. the draft and attended to the business connected with the cargo in suit, viz., the "Hyades"; and Davidson, after Short had left Clarkson's employment, had the dealings with Ginsburg by which he sold the cargo of the "Pleiades", a steamer which arrived at Port Arthur after Short had left Clarkson's employ. This undoubted situation is shown by the further testimony of Davidson. Thus he states (pp. 188-189):

> "Interrogatory No. 38.
>
> "Q. When did the last shipment of flour from the Centennial Mill Company to Clarkson & Company arrive at Port Arthur?
>
> "A. The last shipment of flour from the Centennial Mill Company to Clarkson & Company at Port Arthur arrived at that port on or about the 8th day of February, 1904, but I cannot say positively that I have got the

exact date as I was absent from Port Arthur at the time it arrived.

"Interrogatory No. 39.

"Q. Where had you been?

"A. Tientsin.

"Interrogatory No. 40.

"Q. On what steamer was this flour brought to Port Arthur?

"A. On one of the steamers operated by the Boston Steamship Company or the Boston Towboat Company. Either the 'Hyades' or the 'Pleiades'."

and on page 192:

"Interrogatory No. 48.

"Q. State whether or not Clarkson & Company disposed of any part of that shipment of flour?

"A. Clarkson & Company entered into an agreement with Ginsburg & Company to sell part of this flour, the actual quantity to be determined when delivery was taken."

and upon cross-examination, he stated (p. 198):

"Q. What do you personally know of the shipment of 35,312 sacks of flour per steamship Hyades?

"A. All I know about this shipment is that a steamer belonging to either the Boston Steamship Company or the Boston Towboat Company and called either the 'Hyades' or the 'Pleiades' arrived at Port Arthur on or about the 8th of February, 1904, and while I was manager of the firm of Clarkson & Company at Port Arthur. Just when the steamer referred to arrived I am unable to give the precise date as I was away from Port Arthur on her arrival. On my return to Port Arthur on the afternoon of the 9th of February, 1904, I saw the steamer in the harbor. I arrived after a bombardment by the Japanese fleet * * *."

and p. 199:

> "Q. Did not the Hyades arrive at Port Arthur January 17/30, 1904?
> "A. To the best of my knowledge the steamer Hyades or Pleiades, whichever one it was, arrived at Port Arthur on the 8th day of February, 1904."

He further testified (p. 200):

> "I have no recollection of ever having seen such a draft". (Referring to the draft in suit, dated December 11.)

and again (p. 204):

> "Q. Was any of the flour you attempted to sell to Ginsburg & Company part of the Hyades flour?
> "A. *The flour I sold to Ginsburg & Company formed a part of the shipment that arrived in Port Arthur on or about the 8th of February, 1904.*"

and again (p. 206):

> "Q. How do you know that any such practice was followed in the case of the Hyades flour; when you had not been in the employ of Clarkson & Company or in Port Arthur for several months when the flour was sold?
> "A. I was in Port Arthur when the flour was sold and as I sold the flour myself I know what I am talking about."

This testimony makes clear as the light of day that Davidson had nothing to do with the Hyades flour.

It is not necessary that the jury have resorted to any "inference" or "surmise" as to the particular cargo of which the flour sold to Ginsburg formed

a part, for the reason that the only testimony upon that subject was given by defendant's witness, Davidson, when he said that the flour sold to Ginsburg formed a part of the shipment that arrived at Port Arthur on or about the 8th of February, 1904. This testimony was not changed or modified. It was given by defendant's witness and, therefore, binding upon it. Neither the court nor the jury can assume in the absence of any showing that this statement of Davidson was a mistake. To do so would be to set aside the most fundamental rules of evidence and to indulge in the assumption that because a witness states so and so, the deduction may be reasonably drawn that he meant something else. We respectfully ask how can this portion of the testimony, the only words in the entire record which pretend to state these particular facts, lead to any other conclusion than that the flour sold Ginsburg was not a part of the cargo brought by the "Hyades" and, therefore, could not have been the flour for which the particular draft in suit was given?

We would also urge that there is another circumstance equally conclusive that shows that the money paid by Ginsburg was not used to pay this particular draft or any part of it; this is that the money received by the bank from Ginsburg was *actually sent by the Port Arthur branch to the Seattle branch in payment of two other drafts drawn by the Centennial Mill Company, one for $16,155.20 and the other for $4,136.00.* The sum received from Gins-

burg was 67,000 roubles. The testimony concerning the disposition of this sum of the witness Friedberg is as follows (p. 26):

"Interrogatory 41. State what you know, if anything, of the payment to the Russo-Chinese Bank at Port Arthur by or for account of Clarkson & Co. of the sum of about 67,000 roubles on or about April 30th, 1904.

"Answer. On April 17/30, 1904, according to the cashbook of the Russo-Chinese Bank, Port Arthur, of same date the representative of Clarkson & Co. cashed a check endorsed by him, No. 1156, dated April 16, 1904, for 67,000 roubles, drawn by M. Ginsburg & Co. on their account with the Russo-Chinese Bank at Port Arthur. On the same date Clarkson & Co., paid to the bank (1) the equivalent of the draft, No. 1412/6386 for G. $4,136 received from the National Bank of Commerce of Seattle, plus 6% interest on the same for 220 days=G. $151.65=G. $4,387.65, at the rate of 198=8489 roubles and 55 cop. (2) The equivalent of the draft No. 455/6500 for G. $16,155.20 received from the National Bank of Commerce of Seattle, plus 6% interest on the same for 200 days, G. $538.50=G. $16,693.70, at the rate of 198=33053 roubles, 53 cop. (3) Expenses on the said drafts, bill stamps commission, telegram expenses and postage, 305 rbls. 80 cop. (4) That part to the credit of their own account with the Russo-Chinese Bank at Port Arthur 25,151 roubles 12 cop.

"Of course the bank could not enforce Clarkson & Co. to apply their money in one way or another and was obliged to merely follow their client's instructions. The proceeds of the draft 6386/1412 and 6500/1455 G. $20,981.35 were remitted on the same date to the National Bank of Commerce of Seattle by telegraphic transfer on Ladenburg, Thalmann & Co., New York.

At that time the value of 67,000 roubles represented about $33,838.88 United States currency, at the rate of 198.

"On the 17/30 day of April, 1904, the bank at Port Arthur had in its portfolio besides the draft for $36,149.80 the documents which were attached to the following drafts of the Centennial Mill Co. drawn upon Clarkson & Co.: 1. G. $4136, due February 27th, 1904, Russian style. 2. G. $16,155.20 due March 8, 1904, Russian style. 3. G. $23,468.40 drawn 90 days' sight. All these drafts had the following stamp "Payable at the Bank's demand, rate of exchange on New York at date together with interest at 6% per annum from date of this draft to estimated date of return of remittance in Seattle, Washington." The amount of the drafts G. $4136 and G. $16,155.20 was paid with interest as stipulated on the 17/30 April, 1904, and the amount of G. $20,981.35 remitted to the National Bank of Commerce of Seattle by telegraphic transfer on Ladenburg, Thalmann & Co. of New York. The draft for $23,468.40 was not accepted by Clarkson & Co. and had to be protested for non-acceptance on May 23d, June 5th, American style, 1904, and returned together with the deed of protest for non-acceptance to the National Bank of Commerce of Seattle on June 7/20, 1904.

"I do not know out of what funds Clarkson & Co. paid the drafts mentioned above, but I presume that Clarkson & Co. applied a part of the money cashed from the bank at Port Arthur against M. Ginsburg & Company's check for 67,000 roubles on the same day."

The witness Drozdov testified (p. 52):

"With reference to the payment into the Russo-Chinese Bank at Port Arthur for account of Clarkson & Co. of the sum of 67,000 roubles on or about April 30th, 1904, I know

that on the 17/30/IV/1904, the representative of Clarkson & Co. presented for payment a check drawn by the trading firm Ginsburg & Co. No. 1156, for Rbl. 67,000....., which was paid by the bank in Port Arthur; which is shown by the documents of the cash section of the bank and by the books of the bank for the year 1904, fol. 216 and 217.

"As shown by the cash-book of the bank, the representatives of Clarkson & Co. made on the same day the following payments:

"I. Rbl. 8489.55c. for payment of the draft of the National Bank of Commerce of Seattle, amount: G$4136—6% for 220 days G$151.65= 4287.65 at the rate of exchange of Rbl. 198.—

"II. Rbl. 33053.53. for payment of the draft of the National Bank of Commerce of Seattle, amount: G$16155.20—6% for 200 days G538.50 =G$16693.70, at the rate of exchange of Rbl. 198—

"III. Rbl. 174.50—the commission of the bank on the above drafts.

"IV. Rbl. 70.—telegraph expenses for the transfer of said drafts.

"V. Rbl. 60.30.—stamp duty on same.

"VI. Rbl. 1.00—postage on same.

"VII. Rbl. 25151.12 were deposited on account No. 7 of correspondents 'Loro' of the firm Clarkson & Co.

"At that time the value in G$67,000 roubles was $33,838.38.

"Besides the draft of G$36.194.80.—in the portfolio of the Port Arthur Bank, towards 17/30 April, 1904, were the following drafts, drawn by the Centennial Mill on Clarkson & Co.' and received for collection from the National Bank of Commerce of Seattle.

"I. Draft with enclosure of 1 bill of lading, 1 invoice and 1 insurance policy, 90 days' sight, amount G$4136.—received in letter, date 6/X. the bank acknowledged receipt of these docu-

ments in letter date 8/21/XI/1903. Clarkson & Co. accepted this draft on 27/10/XII/1903, term 27/11/1904 old style, and information thereof was sent to the National Bank of Commerce of Seattle on the same day.

"II. Draft with enclosure of 1 bill of lading, 1 insurance policy and 2 certificates, 90 days' sight, amount G$16,155.20 received with letter, dated 26/X/1903.

"The bank acknowledged receipt of these documents in letter dated 19/2/XII/1903. Clarkson & Co. accepted this draft on 8/21/XII/1903, term 8/21/III/1904 and information thereof was sent to the National Bank of Commerce of Seattle on the same day.

"Though both these drafts were not paid at maturity, the bank was deprived of the possibility of executing protest for non-payment by reason of the notary having left Port Arthur.

"Enclosed in the letter of the bank in Port Arthur, dated 13/26/IV/1904, these drafts were returned to the National Bank of Commerce of Seattle, and the belonging documents were kept in the bank pending receipt of further instructions."

There is no evidence to the contrary.

This sum of 67,000 roubles was paid into the bank by Clarkson & Co. (not by Ginsburg) under special instructions. The bank, of course, had no alternative but to apply the sum so paid in accordance with these instructions, which were (1) to pay the two drafts of $4,136.00 and $16,155.20 with interest and costs and (2) to credit the balance of 25,151 roubles, 12 kopeks to the account of Clarkson & Co. with the Russo-Chinese Bank at Port Arthur.

This money was paid into the bank on April 30, 1904, and the draft in suit, viz., for $36,013.70, did

not become payable by reason of the two days of grace until May 2, 1904 (p. 120).

On the day that this Ginsburg money was paid into the bank, April 30, 1904, Clarkson & Co. owed the Russo-Chinese Bank at Port Arthur on its general account, and entirely independent of the particular draft in question, a sum exceeding 41,000 roubles. Upon pages 36 and 37 of the record is contained a statement from the books of the Russo-Chinese Bank showing the amount of the indebtedness of Clarkson & Co. from December, 1903, to August 28, 1904, from which it will be seen that at all times up to May 28, 1904, Clarkson owed the bank on this general account a sum exceeding 25,000 roubles, which was the amount left over of the Ginsburg payment after the payment of the two other drafts.

We would, therefore, urge that as the testimony in this case now appears, it will require the denial of the truth of everything that was said by all the witnesses, and the assumption of the opposite of what they said, in order to justify any finding to the effect that any part of this Ginsburg money went toward payment of this particular draft. The evidence is clear, direct and uncontradicted, that it went into other channels and to pay other indebtedness. We therefore ask again, as we frequently have insisted upon asking in other phases of this case, what possible relevancy this Ginsburg transaction has to the particular subject matter involved? We may even go further and assume,

for the purposes of argument, that the testimony of Friedberg and Drozdov (the only testimony on the subject) is to be disregarded, and that the balance of the 67,000 roubles, some 25,000 roubles, was not in fact applied to the discharge of the general indebtedness of Clarkson & Co., and that Clarkson & Co., when making this deposit, did not make any request for its application, and even that these 25,000 roubles were, in fact, applied by the Port Arthur branch toward the discharge of the particular draft in question. Even assuming all these things, the Ginsburg transaction affords no basis for the special verdict of the jury, because the amount of this draft of $36,194.80 was 72,389.60 roubles (p. 46) and the application of the 25,000 roubles could not, of course, have paid it in full.

The last statement in the opinion of facts, tending to show payment of this particular draft and in support of the special verdict of the jury, is "There was testimony tending to show that from the 1st of January, 1904, to November 23d of the same year, Clarkson & Co. paid into the Port Arthur bank 126,928 roubles and 97 kopeks".

This fact was elicited from the testimony of the witness Short, who, at page 151, was asked the following question:

> "Q. Now, I wish you would turn to the cash account in the same deposition and state how much money was remitted by the Russo-Chinese Bank from Port Arthur to Vladivostok from January, 1904, down to August, 1904. Are you able to state it from that?"

to which the witness, after figuring, said:

> "A. 79,000 roubles transferred from Port Arthur to Vladivostok from the 25th of March to the 26th of June.
>
> "Q. Are you able to state how much money was collected in or received by the bank at Port Arthur from Clarkson & Company, between the 25th of January and down to so far as the account goes, August, I believe?
>
> "A. From the first of January, 1904, up to the last statement on this account, November 23, there had been deposited with the bank 126,928 roubles and 97 kopeks."

This testimony relates to the account between the bank and Clarkson & Co. at Vladivostok as well as at Port Arthur, and it shows that 79,000 kopeks had been paid by the bank to Clarkson & Co. at Vladivostok, and 126,928 roubles had been paid by Clarkson & Co. to the bank, showing payments by Clarkson, in excess of receipts of 47,928 roubles. But this does not show that this payment had anything to do with the particular draft in question for several reasons. In the first place, there is nothing to show that these 126,928 roubles so paid by Clarkson & Co. were derived in whole or in part from the "Hyades" consignment. No such claim is made. Upon the contrary, it appears from the testimony, already referred to, of the witness Friedberg (pp. 36-37-38) that during all this time Clarkson & Co. owed the bank on its general account large sums of money. It having been shown that there were many other transactions between these parties, no presumption can be indulged that this particular

balance of 47,928 roubles was used or had any relation with the payment of this particular draft, for as the testimony shows, there were many drafts and many other transactions.

We here invoke the rule that the presumption that a draft is unpaid, which arises from the payee's possession of the draft uncanceled, is not sufficiently met by showing a payment of money by the debtor without a further showing that there were no other dealings between the parties upon which such payments might have been made.

In this case it is undisputed that the draft was protested for non-payment and mailed to the Seattle bank with a letter stating that it had been protested for non-payment and was not paid. This draft, therefore, ever since has been, and now is, in legal contemplation in the actual possession of the Seattle bank. From this possession, the presumption arises that it has not been paid. This presumption cannot be overcome by simply a general showing that between certain dates, Clarkson paid the bank certain sums of money, because in order to do so, it would have been necessary to show that this was the only draft and the only transaction upon which the money so paid could have been applied.

In the case of *Somervail v. Gillies,* 31 Wis. 152, a similar question was considered, and the court said:

> "This case, so far as the decision depends upon presumptions arising from the facts proved, is one where the presumptions conflict and run directly counter to each other. The

presumption of payment, arising from the maker's having paid or delivered money to the payee of the note, is encountered by the opposite presumption arising from the note remaining in the hands of the payee or his legal representative, uncanceled and with no receipts of the alleged payments endorsed. The mere fact of the payment by one person to another is presumptive evidence of the payment of an antecedent debt, and not of a loan. In the present case, had it been shown that there were no other dealings between the parties, and that no other indebtedness existed than upon the note in suit, the proof of payment of money by the maker to the payee of the note would have created a very strong and almost conclusive presumption of payment upon the note. But no such facts were shown, and herein the weakness of the defense and imperfect and unreliable nature of the presumption are disclosed. Conceding both sums of money represented by the checks to have been paid by the maker to the payee, of which the check for one sum, payable to bearer and without the payee's receipt for the money endorsed thereon, was no evidence, still they may have been payments upon other debts due from the maker to the payee, instead of upon the debt due upon the note; or they may have been payments made in the course of other dealings or business transactions between the parties. Under such circumstances, to give the maker of the note the benefit of the presumption claimed for him, requires at the same time the aid of another presumption, which cannot be indulged, namely, that there were no other debts or dealings to which the payments could have been applied. The presumption of payment of the note, therefore, arising from the mere fact of payments of money being shown to have been made by the maker to the payee, is not only met, but

> in fact overcome, by the presumption arising from the possession of the note by the payee still uncanceled and unextinguished by indorsements of payments upon it. The presumption, when a note has been paid, is, that it has been taken up by the maker, or otherwise canceled so as to show that the debt is extinguished. When paid, the maker is entitled to delivery of it, and such is the usage of merchants and all persons giving and receiving such paper. If but a partial payment is made, the custom is for the maker, at the time of paying, to see that it is endorsed. From these well known usages arises the presumption, which, until rebutted, is decisive, that an outstanding note is still unpaid. This presumption the evidence in this case failed entirely to rebut, and the court was correct in the special instruction given, that the burthen was upon the maker to show that the checks in question were given and received as payments on the note, and that no presumption could be made from such mere payments against the note in the hands of the holder."

We have now endeavored to pass in review all the facts and circumstances mentioned in the court's opinion as going to uphold the special verdict of the jury. We do not again refer to the evidence showing that the draft was not paid; we recognize that this court will not set aside a verdict upon the ground of a conflict in the evidence or inconsistencies therein. Our claim is that there is no legal evidence in any of the facts and circumstances mentioned to show that this draft was, in fact, paid. We summarize as follows:

1. That Short gave and the bank accepted a letter of guaranty is immaterial unless it be shown

that Clarkson & Co. acted on this letter of guaranty and did actually dispose of the flour. There is no evidence whatever to this effect, because Short, the only witness interrogated on the subject, testifies that he does not know that a single sack of the "Hyades" cargo was ever sold or any money ever paid into the Russo-Chinese Bank therefor.

2. The 67,000 roubles derived from the Ginsburg sale were not applied in payment of this draft for two reasons:

(a) It concerned another cargo of flour;

(b) This money was used to pay other drafts and indebtedness.

3. The fact that Clarkson & Co. paid the Port Arthur Bank, between January 1, 1904, and November 23, of the same year, 126,928 roubles and 97 kopeks is no evidence that this sum, in whole or in part, was applied on this draft because there was evidence of many other dealings between the parties upon which this payment might have been applied.

The fact, also, that this case has a double aspect, and that plaintiff is entitled to recover either upon an implied or an express contract should not be lost sight of. The express promise of defendant to repay this money was (p. 93):

> "We on our part agree upon return to us of both sets of bills, showing that the draft has not been paid, to reimburse you in the sum paid us, provided that we were in no wise injured by the fact that your Port Arthur branch has indefinitely held the bills after their maturity at

which time they could have been returned to us and we could have collected from the steamship company."

The only evidence required by the defendant bank by this agreement showing that the draft had not been paid was "the return of both sets of bills". These bills were returned; therefore plaintiff complied with the only condition precedent imposed upon it, and defendant should not subsequently be heard to say that it was not sufficient.

II.

NO CUSTOM OR USAGE CAN AFFORD A PRESUMPTION THAT A PARTY WILL VIOLATE HIS CONTRACT.

The principal, and as we think the only, argument advanced to show that this draft was paid is the evidence that for a considerable period of time the Port Arthur branch had permitted Clarkson & Co. to dispose of flour, without payment, upon delivery of a letter of guaranty. The claim is that because the bank had so acted in previous cases it did so in this case.

If we assume that these previous consignments were governed by the same instructions as the present one, viz., against payment, there, nevertheless, can be no custom or usage which would warrant either court or jury in assuming that because the bank had violated its instructions in the past it did so in the present case.

That Clarkson took possession of the 35,312 quarter-sacks of flour and commenced selling it and paying into the bank the proceeds is stated by the court in the opinion to be "a fair inference from the testimony of Short as well as that of Davidson".

Now Short testified that he gave the bank the letter of guaranty, and we may assume also that the manager of the bank then acquiesced in his taking the flour, although this latter is not directly stated. But here Short's testimony stops, because he says that he does not know what was done with the letter of guaranty or whether or not any of the flour was sold thereunder. We must, therefore, as this court has done in its opinion, invoke a presumption, if we are to have any evidence whatever that Clarkson & Co. ever did take the flour and sell it, for of direct testimony there is none. This inference or presumption must be that because Clarkson & Co. had previously taken possession of and sold flour without paying for it, that they did the same thing in this case.

The instructions in the present case were to hold the documents against payment, and any presumption that the bank permitted this flour to be sold contrary to these instructions and that it was so sold must be predicated upon an illegal act, not only of the bank but also of Clarkson & Co., because Short testifies that he knew that the bank held these bills of lading against payment of the draft. As agent of the steamship company Clarkson & Co. knew, not

only from the direct language of the contract but also from the general law merchant, that the steamship could not legally surrender possession of the cargo except upon a surrender of the bills of lading. They furthermore knew that they had been specifically directed by Clarkson to require the surrender of the bills of lading, so to assume that Clarkson & Co., as agent of the steamship company, because they had been accustomed to deliver cargoes in the past without surrender of the bills of lading, did so in this case, necessarily requires the presumption that a contract was violated and indeed that a crime had been committed because Short said it was a criminal offense (p. 163).

> "It has been repeatedly asserted by the courts that a custom or usage to be valid must not be contrary to law. The rule stated more in detail is that evidence of custom or usage is inadmissible to contravene clear and unambiguous statutory or contractual provisions, or well-settled rules of public policy; or to oppose or alter established legal principles and upon a given set of facts make the rights or liabilities of individuals other than they are at the common law."
>
> *Eng. & Amer. Enc. of Law,* Vol. 29, p. 376.

Custom or usage cannot be invoked to prove that any contract has been violated. There can be no presumption that a party violates a particular contract because he has been accustomed to violate similar contracts in the past, for the presumption is that the law has been obeyed, and that the person's acts are legal, not illegal. Hence, to permit a

course of dealing, admittedly illegal, to afford a presumption of a continuance of such illegal acts involves a conflict of presumptions. There is no presumption that an illegal act or course of dealing is continued. The ordinary presumption is "that a thing once proved to exist continues as long as *is usual with things of that nature.*"

Cal. C. C. P. Sec. 1963, Subd. 32.

It involves an absurdity to say at least in legal contemplation that there is any presumption that it is usual in contracts of this character to violate them.

III.

IF ANY OF THE INSTRUCTIONS CONCERNING THE OBLIGATIONS OF THE PORT ARTHUR BRANCH RELATIVE TO THE FLOUR WERE ERRONEOUS, ERROR MUST BE PRESUMED, AND SUCH ERROR IS NOT CURED BY THE SPECIAL VERDICT. HEREIN IS PARTICULARLY DISCUSSED THE INSTRUCTION THAT PERMISSION TO TAKE THE CARGO WAS EQUIVALENT TO PAYMENT OF THE DRAFT.

As fully noted in our brief, the trial court instructed the jury at length concerning the relation of the collecting bank to the consignment of flour. The jury were told that the plaintiff was required to deal with the property in the same way that an intelligent and prudent owner of property would deal with his own property, and that

> "As the agent for the owner it was obligated to account for the amount of the draft, to ac-

> count for the security which the bill of lading constituted, and it cannot be excused from obligation to account by saying that the flour disappeared with its knowledge, and require the defendant in this case in order to fasten an obligation upon it, to prove that it was negligent" (p. 233).

and further:

> "By virtue of these endorsements and transfers the legal title to the draft and the documents and to the flour in question passed to and became vested in the Russo-Chinese Bank, and I instruct you that as a matter of law it was in the power of the plaintiff to handle, control, sell and dispose of such flour in any way that was deemed expedient by the plaintiff" (p. 227).

Coupled with the assignments of error predicated upon the giving of these instructions were others as to the refusal to give instructions requested by the plaintiff to the effect that in the absence of any special instructions the obligations of the collecting bank were to preserve the documents safely, to present the draft for acceptance, and upon the nonpayment protest it; that in any event the plaintiff bank was bound to use only reasonable and ordinary care and skill. These instructions so refused are set forth at length on pages 15 to 19 of our brief.

It is undisputed that this draft was sent to the Port Arthur branch "for collection" and without further instructions.

We will not now weary the court by a repetition of our previous argument in the endeavor to show that these instructions imposed upon a collecting

bank a responsibility quite foreign to their employment; that the instructions given and all the circumstances of the case show, beyond question, that the Port Arthur branch was merely employed as an agent to handle these documents; and no special instructions having been given, although requested, the Port Arthur branch were justified in assuming that they had no responsibility concerning the flour.

In addition to these instructions, the court also instructed the jury as follows (this instruction has already been copied in this petition and is here repeated for convenience):

> "If you find from the evidence in this case that plaintiff permitted Clarkson Company to take over the flour under such an arrangement as the defendant claims with the stipulation that the plaintiff was the owner of the flour and with the agreement that Clarkson & Company would account to the plaintiff for the proceeds of the sale of the flour, then I instruct you that such action on the part of the plaintiff constitutes in law a payment of the draft in question and the plaintiff cannot recover and your verdict must be for the defendant."

We now claim that these instructions are inseparably connected with the special verdict; that if they be wrong, error necessarily must be presumed and the special verdict fall. We believe the general rule as adopted by the federal courts is that error presumes prejudice; that it is only when it appears so clear as to be beyond doubt that the error challenged did not prejudice, and could not have preju-

diced, the complaining party, that the rule is applicable that error without prejudice is no ground for reversal.

Boston etc. R. R. v. O'Reilley, 158 U. S. 334;
U. S. v. Gentry, 119 Fed. p. 75;
Union Pacific R. R. v. Field, 137 Fed. p. 18;
Choctaw R. R. Co. v. Holloway, 114 Fed. p. 465;
Stewart v. Brune, 179 Fed. p. 355;
U. S. v. Ute Coal & Coke Co., 158 Fed. p. 29;
Durant Min. Co. v. Percy Cons. Min. Co., 93 Fed. p. 169.

In the case of *Atchison, Topeka & Santa Fe R. R. v. McClerg,* 59 Fed. 863, the court said:

> "Unless it clearly appears from the face of the record that the error was harmless, we are not allowed to speculate as to its probable consequences."

The instructions given concerning the flour were tantamount to an instruction to find a verdict for the defendant, because, as noted, the jury were told that the collecting bank could not be excused from its obligations to account by saying that the flour disappeared without its knowledge. This could mean nothing other than that the plaintiff was required either to produce the money or the flour. It could not avoid liability, as the jury were told, by simply proving or showing that it had not had possession of the flour and did not know where it was. Apparently, under these instructions, if this flour had been lost *en route* and never reached Port Arthur, still the Port Arthur bank would be liable

because in that case the flour would have "disappeared without its knowledge".

These instructions are directly connected with the special verdict by the last instruction above quoted. For having first told the jury that the responsibility of the Port Arthur branch was the same as that of any owner of the flour, and that the bank was, in fact, for the purposes of this transaction, the owner of the flour, the jury is next instructed that if the plaintiff permitted Clarkson & Co. to take over the flour under the arrangement testified, then that such action constituted *a payment of the draft in question.* Under these instructions, when the jury proceeded to deliberate upon this special verdict their consideration was not limited to the question of a payment *in money;* on the contrary, if they believed that plaintiff had permitted Clarkson & Co. to take over the flour under the letter of guaranty, then they were *compelled* to return the special verdict as they did, although they may have believed that there was no evidence whatever that any payment in money had been received.

We ask, under the authorities cited, if this record contains anything which shows that the error in giving these instructions was "harmless"? It would seem that to the contrary the entire theory of the trial court, as announced to the jury, compelled the special verdict. It is not possible that instructions so fundamental and underlying to the fullest extent the most primary obligations of the parties could be harmless error.

We urge in particular that the instruction above given, that permitting Clarkson & Co. to take over the flour was in itself a payment, is obvious error, to which exceptions were fully taken. It will be noted that the jury were told, as a matter of law, that they need only find a single fact, viz., that plaintiff did give this permission, and from such fact alone the jury were directed to return a special verdict that the draft had been paid, and a general verdict for the defendant.

If we consider that the plaintiff bank did permit Clarkson & Co. to take over this flour under the arrangement testified and, indeed, if we go to the extent of admitting that the plaintiff bank delivered to Clarkson & Co. the bills of lading contrary to instruction, even then such act, as a matter of law and without the consideration of other facts, cannot conclusively be considered a *payment.*

The damages resulting from a conversion of property are clearly defined in law. If an agent wrongfully converts the property of his principal to his own use, then the detriment caused by this wrongful conversion is presumed to be the *value of the property* at the time of the conversion with interest, to which some authorities add a fair compensation for the time and money expended in pursuit of the property.

If, therefore, this instruction were correct in other respects, it should have stated that if the plaintiff bank was guilty of a conversion of the flour, then that it was liable in damages to the owner of the

flour for the *value* thereof, but such liability is not *a payment* of the draft, or the amount of the draft for the obvious reason that the jury is, in such a case, required to pass upon the value of the property so converted; they might have concluded that it was worth more or less than the face value of the draft. In any event, the plaintiff bank, charged with this liability, has the right to have a *jury* pass upon the extent of this liability, and the *court* cannot say, as a matter of law, that it was the face of the draft.

That this instruction is erroneous would seem to follow directly from the argument for defendant in error made in this case. At pp. 20-21 of his brief counsel cites authorities to the effect that where a collateral note is released and the proceeds received by the pledgee it operates as a payment *pro tantum* of the debt secured, and counsel say:

> "We believe it to be a well settled principle of law that where a pledgee without specific instructions takes over the collateral to itself or releases the collateral from the pledge, such release of the collateral operates in law as payment of the claim at least to the extent of the value of the collateral."

In this case the court has instructed the jury that a release of the collateral operates in law as a payment to the full extent of the claim, but has omitted to state the essential words, "to the extent of the value of the collateral".

This instruction also omits another essential element in the relations between these parties, for it

is admitted that this draft was *accepted* by Clarkson & Co., who then became its principal debtor. This draft was mailed to the Seattle bank and in legal contemplation was, therefore, returned to it. If it disappeared then a copy was equally good evidence. There is nothing in this instruction, nor is there any evidence, that the Seattle bank ever attempted to collect from Clarkson & Co. the amount of this draft, or made any demand therefor. If the Port Arthur branch did violate instructions it was nevertheless, the duty of the creditor, the Seattle bank, to make the damages resulting from this negligence as light as possible. They could not have recovered anything against the Port Arthur branch in a direct suit predicated upon negligence without alleging and proving that by such acts the promise of Clarkson & Co. had become valueless. Now, there is no evidence here that Clarkson & Co. have not at all times been able to pay this draft. Under no possibility could the Seattle bank in such a suit have avoided alleging in its complaint that by reason of such negligence the plaintiff had been placed in a position where it *could not collect the draft.* Yet, as noted, the record is entirely silent on this subject. This instruction, therefore, is again erroneous in that it should have stated that "if the Seattle bank by virtue of these acts of alleged conversion had lost its rights against the primary debtor, etc.".

The error in this instruction is again strikingly shown in the fact that it makes the "permission" of the bank equivalent to "payment".

To constitute a conversion there must be not only the intent but also the consummation of such intent. The mere fact that the agent gives an illegal permission is not a conversion.

> "Conversion is an unauthorzed assumption and *exercise* of the right of ownership over goods or personal chattels belonging to another to the alternation of their condition or the *exclusion of the owner's rights.*"
>
> *Bouvier Law Dict.*

If this had been an ordinary action for damages against the Port Arthur branch on account of this alleged conversion, the complaint must necessarily have alleged that the defendant bank not only gave its permission, but that the flour was actually taken over by Clarkson & Co. and the plaintiff thereby deprived of it. Failing in this, the complaint would not state a cause of action.

So, in the present case, if by any slack definition of terms it may be said that the liability of the Port Arthur branch, resulting from its unauthorized act, was a payment of the draft, still, even under such theory, it was necessary that the instruction state not only that this illegal permission was given, but also that it was acted upon and that the flour was taken over by Clarkson & Co. and sold or disposed of in such way that the true owners of the flour could not recover it. The fact that the owner by defendant's acts lost the *property* is of course a necessary element of any action on the case for a conversion.

This instruction does not contain this essential element to any act of conversion, and therefore we urge that it is erroneous, even though there had been ample evidence as to what had become of the flour. But there is no such evidence and the record is silent upon this subject.

The witness Short testified (p. 148) when asked the question:

> "Q. What became of the flour securing these drafts?
> "A. They were put into Clarkson's warehouse and afterwards sold."

But he was then testifying concerning the *two other drafts* for $4136 and $16,155, respectively (p. 147). Concerning the flour in question he said (p. 141):

> "Q. How many sacks of flour, if you know, were sold by you between the time of the acceptance of the draft and the time you left Clarkson & Co.'s employ?
> "A. Well, sold by Clarkson's office, including myself, I should say about ten or twelve thousand bags.
> "Q. To whom was that sold?
> "A. It was sold mostly through the compradores by Clarkson & Co. to Chinese contractors working on the forts and on the government roads."

This testimony was not given concerning the "Hyades" flour specifically, but concerning all the flour in the warehouse at the time. This is clearly shown by the statement, upon cross-examination, of the same witness, already fully quoted, to the effect (pp. 159-160) that of his own knowledge he

did not know whether or not these 8000 sacks of flour were a part of the "Hyades" cargo, and that he did not know whether any of the "Hyades" flour was sold.

When all of the testimony of this witness is read, it will be seen, we think beyond any possibility of argument, that he does not pretend to say that he knew whether or not any of the "Hyades" flour was ever sold. The circumstances of the arrival of the vessel, and his severance of relations with Clarkson & Co., and departure from Port Arthur would make such personal knowledge on his part impossible.

The only other witness, Davidson, gave no testimony on this subject concerning the "Hyades" flour, except as the Ginsburg sale may be considered a part thereof, a subject which we have already fully discussed. As frequently already stated in this petition, he answered in response to direct interrogatory No. 56 (p. 194) that he did not know whether or not this draft was ever actually paid since he left Port Arthur long before it fell due, and he is positive that the flour he sold Ginsburg & Co. (p. 204) formed a part of the shipment that arrived in Port Arthur on or about February 8, 1904.

We therefore urge that the instruction now under consideration is erroneous in at least three particulars:

(1) That the jury should have been told that the liability of the bank for such alleged conversion

was the value of the property converted and not necessarily the face of the draft; that in no event could it be a payment of the draft.

(2) That the instruction given makes the "permission" of the bank a complete conversion without the necessity of any finding by the jury as to whether or not that permission was ever acted upon.

(3) That this claim against the bank called payment is nothing other than a claim for damages arising from negligence and that the damages in such a case cannot be greater than those actually sustained. To prove these damages, evidence that the Seattle bank had thereby been unable to collect from Clarkson is essential and the instruction is fatal in not thus stating.

IV.

THERE WERE ERRORS IN THE ADMISSION AND EXCLUSION OF TESTIMONY WHICH WERE NOT CURED BY THE SPECIAL VERDICT.

We have already referred (we fear at wearisome length) to the examination of the witness Davidson concerning previous transactions between the Port Arthur branch and Clarkson & Co. These interrogatories and answers concerned the course of dealing between the parties in the handling of previous drafts with documents attached. A fair sample of these questions is the following (p. 179):

> "Q. What is the custom of the Port Arthur bank upon the arrival of shipments where

drafts with bills of lading are attached are in their hands for collection?"

To this question an objection already printed in this petition was made to the effect that the question was immaterial until the character of the draft or the instructions accompanying it were first stated. That is, the witness might have been testifying to a transaction in which the Port Arthur branch had been authorized to deliver the bill of lading when the draft was accepted. Until that essential fact was developed, the testimony could have been of no value.

Nevertheless this objection was overruled and the question answered at length. Then there followed many other questions, all bearing upon the method adopted by the Port Arthur branch in previous cases, and to each of these questions the same objection was made and exception allowed.

The witness Davidson was not asked, nor did he pretend to state that he had any knowledge of the instructions that accompanied any set of drafts. We therefore again earnestly request the court to again consider this line of questions and the objections thereto.

We also again venture to invite the court's consideration to the alleged error assigned and discussed on pages 57-58 of our brief. This ruling occurred in connection with direct interrogatory 56 of the witness Davidson (page 194). The question was:

"Do you know whether this draft drawn by the Centennial Mill Company and in the hands of the branch of the Russo-Chinese bank at Port Arthur covering this shipment of flour was ever actually paid?"

To which the witness answered:

"No; I have no knowledge, definite knowledge, that it ever was paid since I left Port Arthur long before it fell due. But if it was not paid by Ginsburg & Company then it was the fault of the Russo-Chinese Bank because the firm of Ginsburg & Company to my definite knowledge have ever since been able to pay this draft and if for any reason the arrangement I made with Ginsburg & Company was avoided or not carried out then the Russo-Chinese Bank had it within their right and power to demand the surrender of the keys to the warehouse from Ginsburg & Company."

The plaintiff objected to that portion of the answer beginning with the words "but if it was not paid" for the reason that the witness had already stated that he did not know whether it was paid or not. The matter so objected to was highly detrimental to the plaintiff because the witness there definitely stated that the firm of Ginsburg & Co. had always been able to pay this draft, and thus, although the witness knows nothing of his own knowledge concerning the matter, he is allowed to place before the jury his inference or surmise that it might have been paid if the Russo-Chinese Bank had carried out the arrangement with Ginsburg. Neither the question nor the special matter called for permitted any inference or surmise.

If "A" sues "B" upon a promissory note, and the witness is asked if he knows whether or not the note was ever actually paid, and he answers "No", is he properly permitted in answer to this same question to state "but it might have been paid if so and so had happened"?

If these questions and rulings upon these questions asked the witness Davidson were erroneous, they must of necessity have been prejudicial to the plaintiff because they were directly concerned with the question of the payment of the draft.

For these reasons we ask for a rehearing in this case.

Dated, San Francisco,
August 6, 1913.

CHICKERING & GREGORY,
Attorneys for Plaintiff in Error.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for plaintiff in error in the above entitled cause and that in my judgment the foregoing petition is well founded in point of law as well as in fact and that said petition is not interposed for delay.

WARREN GREGORY,
Attorney for Plaintiff in Error.

6

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

RUSSO-CHINESE BANK, a Corporation,
Plaintiff in Error,
vs.
THE NATIONAL BANK OF COMMERCE OF SEATTLE, WASHINGTON,
Defendant in Error.

No. 2182

Upon Writ of Error to the United States District Court for the Western District of Washington, Northern Division.

BRIEF FOR DEFENDANT IN ERROR.

The argument set forth in the petition for rehearing filed herein does not seem to us to add anything to the former argument of counsel for the

Russo-Chinese Bank. Substantially every contention contained in the petition for re-hearing was vigorously urged in their former brief, and our argument in opposition to the same is set forth in our original and supplemental briefs heretofore filed in this cause, to which we now refer.

The first contention of the plaintiff is stated by counsel as follows:

"We still urge that there is no legitimate evidence that the draft in question has ever been paid. Upon the contrary, that the evidence is clear and conclusive that it has never been paid."

And upon pages 40 and 41 of the petition counsel summarize their contention as follows:

(1) "That Short gave and the bank accepted a letter of guaranty is immaterial unless it be shown that Clarkson & Company acted on this letter of guaranty, and did actually dispose of the flour. There is no evidence whatever to this effect, because Short, the only witness interrogated upon the subject, testifies that he does not know that a single sack of the Hyades cargo was ever sold, or any money ever paid into the Russo-Chinese Bank therefor."

(2) The 67,000 roubles derived from the Ginsburg sale were not applied in payment of this draft for two reasons:

(*a*) It concerned another cargo of flour.

(*b*) The money was used to pay other drafts and indebtedness.

(3) The fact that Clarkson & Company paid the Port Arthur Bank, between January 1, 1904, and November 23 of the same year, 126,928 roubles and 97 kopeks is no evidence that this sum, in whole or in part, was applied on this draft, because there was evidence of many other dealings between the parties upon which this payment might have been applied.

The particular evidence tending to show the payment of the draft for $36,194.80, the price of 36,000 sacks of flour sold by the Centennial Mill Company to Clarkson & Company, is set forth by us in our original brief, pages 11 to 24, inclusive, to all of which we refer and make a part of this argument.

Counsel in the petition criticizes the reasoning of this Court in its opinion, holding that there was an absence of evidence to support the special verdict of the jury to the effect that the draft had been paid.

We do not think we can add anything to the logic or force of the Court's opinion. It seems to us to be clear, convincing and unanswerable. Counsel admit on page 6 of their petition that if the letter of hypothecation was taken by the bank, as testified to by Short, such action "would, without doubt, have been negligence on the part of the bank for the con-

sequences of which it would be responsible;" but asserts that "it would not have been payment of this particular draft, and cannot of itself make possible this special verdict of the jury."

It therefore appears from counsels' own admission that if the Russo-Chinese Bank did take a letter of hypothecation from Clarkson & Company, as shown by Short's testimony, then the bank became responsible for the loss. Counsel admit that the bank violated its duty to the defendant if it did take the letter of hypothecation, and there is no contradiction in the testimony as to the fact that the letter of hypothecation was taken by the bank, by the terms of which the bank permitted Clarkson, as agent of the Steamship Company, to deliver the flour over to Clarkson, the merchant, and to sell the same, taking Clarkson's agreement to account to the bank for the proceeds of the sale of the flour.

We might say, in passing, that one of the defenses set up in the answer was that if the Russo-Chinese Bank failed to collect the amount of the draft, such failure was due to its own negligence and breach of duty which it owed the defendant; and now counsel admit that if the letter of hypothecation was given the bank became liable to the extent

of the damage, and it necessarily follows that the plaintiff owes to the defendant the value of the flour, or the amount of the draft.

The testimony of Short disclosed that at the time of the acceptance of the draft in question there were in Clarkson's warehouse at Port Arthur only six or eight thousand sacks of flour; that 36,000 sacks were placed in the warehouse upon the arrival of the "Hyades;" that between the date of the arrival of the "Hyades" and the time that Short left Port Arthur, about the 9th of February, 1904, ten or twelve thousand sacks of flour had been sold. This will leave from 32,000 to 34,000 sacks of flour in Clarkson's warehouse, and there is no dispute as to the value of the flour. The value of the flour was from 2.40 to 2.65 roubles per sack (Rec., p. 152), and there was no other merchandise in excess of the value of about 15,000 roubles in Clarkson's warehouse at the time Short left Port Arthur.

By the terms of the letter of hypothecation the Russo-Chinese Bank assumed complete ownership of the flour and took Clarkson's obligation for its payment. The bank directed the Steamship Company to surrender the flour, and in lieu of the flour took Clarkson's promise to pay for it out of the proceeds

of its sale. This clearly shows an intentional conversion of the flour by the bank, and the testimony in the case fixes the value of the flour at a sum in excess of the amount of the draft. The conversion could not have been more complete had the Russo-Chinese Bank, vested with the legal title to the flour, sold it directly to Clarkson and taken Clarkson's note in payment of it. Could it have been contended that there was no conversion had the bank taken the note of Clarkson for the amount of the draft? The effect of what the bank did was to take Clarkson's promise to pay, or his written obligation, as shown in the letter of hypothecation. In lieu of the flour the bank received the written promise to pay. The taking of the letter of hypothecation containing a promise to pay was an acceptance by the bank of payment by Clarkson in this way instead of in money. The situation would not have been different in legal effect if Clarkson had paid for the flour in money and the bank had then re-loaned the money to Clarkson, taking as its security the letter of hypothecation.

The authorities which we have cited in our original brief are to the effect that if the holder of collateral sells or converts the collateral he becomes

liable for the value of such collateral and must apply it upon the indebtedness, and that evidence of such conversion can be shown under a plea of payment.

"Upon the plea of payment, to debt on bond, it is competent for the defendant to give in evidence that wheat was delivered to the plaintiff on account of the bond at a certain price, and that the defendant assigned sundry debts to the plaintiff, part of which were collected by the plaintiff, and part lost by his indurgance or negligence."

Buddicum vs. Kirk, 3 Cranch, 294, and other cases cited.

And in this instance the value of the flour converted is shown to be in excess of the amount of the draft, and we cannot view it in any other way than as a payment of the draft.

It would not be material, it seems to us, whether the flour was ever sold by Clarkson or not. It passed beyond the control of the defendant when the Russo-Chinese Bank advised Clarkson, the agent of the Steamship Company, to turn the flour over to Clarkson, the merchant. The defendant was deprived of its security by this action of the bank, and the bank's action constituted a payment by Clarkson to it.

However, the evidence does clearly show, beyond the possibility of a doubt, that the flour in question was sold by Clarkson & Company. There were only 32,000 to 34,000 sacks of flour left in Clarkson's warehouse on the 9th of February. Shortly thereafter, and before the 17th of February, when Davidson left Port Arthur, the balance of the flour in the warehouse was sold to Ginsburg, through the instrumentality of the plaintiff. The evidence shows that at least 67,000 roubles were received for this flour, and the evidence of Short is that there was no other flour in the warehouse belonging to Clarkson. How, then, can it be said that there was no evidence of the sale of this flour by Clarkson? We know that Davidson received from Ginsburg some money and some drafts on Hong Kong, and that the Russo-Chinese Bank collected from Ginsburg 67,000 roubles, all for flour sold by Clarkson from his Port Arthur warehouse, and the "Hyades" flour was the only flour in the warehouse. Consequently the evidence affirmatively shows that Clarkson & Company not only received permission from the Russo-Chinese Bank to take over the flour shipped by the "Hyades," and to sell the same under a promise to account for the proceeds of the sale, but that Clarkson & Com-

pany actually acted under such permission and actually sold the flour, and the instructions on pages 6 and 7 of the petition are not erroneous, even under counsel's own argument. Counsel admits that if permission were given by the bank to Clarkson & Company to sell the flour, and Clarkson actually sold it and failed to account for the proceeds, this would be equivalent to a payment. Yet the facts are that this is exactly what was done. Permission was given to sell the flour and it was sold, and the value of the flour is not contradicted, which was an amount at least equal to the draft.

Even if counsel were correct (which we do not admit) in stating that the defendat should only be entitled to the value of the collateral by reason of the negligence of the Russo-Chinese Bank, still under the evidence in this case the value of the flour is clearly shown, and is equal to the amount of the draft. So it was not necessary to give any instructions as to any partial liability on the part of the Russo-Chinese Bank. The evidence was conclusive and uncontradicted that the breach of duty on the part of the Russo-Chinese Bank resulted in the total loss of the flour, which was of a value in excess of the amount of the draft.

Upon page 10 and following pages of the petition the contention is made that the evidence of the custom among bankers at Port Arthur was inadmissible. This point is discussed in our original brief, pages 32 to 36, and we here refer to the same. But the evidence as to the custom among bankers was clearly admissible for another reason. Counsel makes the contention that when the 67,000 roubles were collected by the Russo-Chinese Bank from Ginsburg, 42,000 roubles of this money were sent to the National Bank of Commerce in payment of two other drafts, one for $4,136 and the other for $16,155, drawn by the Centennial Mill Company upon Clarkson & Company and in favor of the defendant bank. The inference that counsel seem to draw from this contention is that the defendant bank received a portion of the proceeds of the "Hyades flour and therefore has not been injured. The fact of the matter is, and the evidence shows, that prior to the shipment of the "Hyades" flour two other shipments of flour had been sold by the Centennial Mill Company to Clarkson & Company, for $4,136 and $16,155, respectively, with bills of lading attached drawn against payment, and that the Russo-Chinese Bank permitted Clarkson & Company to take over the flour

represented by these shipments under a similar letter of hypothecation, and that the Russo-Chinese Bank, by reason of its breach of duty in allowing Clarkson to take the flour represented by these shipments rendered itself liable to the National Bank of Commerce, and when the collection was made from Ginsburg the Russo-Chinese Bank was merely paying its own obligation to the National Bank of Commerce. And Short testified that the same arrangement was adopted by the Russo-Chinese Bank in the handling of the shipments represented by the amounts above named as in the "Hyades" shipment.

Counsel also at page 15 of the petition, criticize the opinion of this Court in commenting upon the failure of Mr. Ofsiankin to testify as to the letter of guaranty, and contend that there was nothing in the record that could advise Ofsiankin that the giving of a letter of hypothecation would be involved in this case. The deposition of Davidson (Rec., p. 185) shows that a letter of hypothecation was required by the Russo-Chinese Bank before consenting to the delivery of the flour, and states the contents of such letter of hypothecation. The plaintiff was advised by this deposition of the importance of having the testimony of Ofsiankin, the manager of the

bank, if it desired to contradict the testimony of Davidson; and the plaintiff cannot plead surprise at the introduction of such testimony. Moreover, the record shows that at the former trial the defendant demanded of the plaintiff the production of this letter of hypothecation, and it would seem that the testimony of the man in charge of the bank should have been produced, if it could have been produced, and the jury might have been impressed by the failure to produce this testimony, just as this Court was impressed by it.

On page 18 of the petition counsel refers to a statement. We desire to call the attention of the Court to the fact that Clarkson also testified that he had given instructions to his Port Arthur house not permit any consigned goods to be taken out of the warehouse without the production of the bills of lading, or the consent of the bank, which shows that Clarkson had in mind the fact that a custom existed for the bank to direct the delivery of consigned flour.

On page 19 of the petition counsel undertake to explain the failure on the part of the bank to produce a copy of the letter of hypothecation. We fail to see how the fact that the defendant had demanded the original of the letter of hypothecation more than

a year before the trial would excuse its non-production, even if defendant's counsel did say that he did not think the plaintiff would produce it, because counsel for plaintiff had said they did not have it.

Short testified that the Russo-Chinese Bank did take the letter of hypothecation, and the jury evidently believed him, and if the bank had such letter it was its duty to produce it, if it wished to escape the unfavorable inference that the jury may have placed upon its action in failing to produce it, or to account for its absence.

On pages 20 and 21 of the peitition the contention is made that Short testified that he did not know whether or not the "Hyades" flour had been sold prior to the time he left Port Arthur. This Court will remember that there were but six or eight thousand sacks of flour in the warehouse when the "Hyades" flour, consisting of 36,000 sacks, arrived. The aggregate of these two would make from 42,000 to 44,000 sacks. Short stated that ten or twelve thousand sacks had been sold after the arrival of the "Hyades" flour; that he could not tell whether the old flour was sold, or whether the "Hyades" flour had been sold. But it strikes us that this is wholly beside the question, because the evidence is con-

clusive, both on the part of Davidson and Short, and also the witnesses for the plaintiff, that all of the flour left in the Clarkson warehouse was sold to Ginsburg. Short's testimony is that there was no other flour than the "Hyades" flour and the six or eight thousand sacks that were in the warehouse upon the arrival of the "Hyades" flour.

Counsel, however, on pages 24 to 35 of the petition, contend that Davidson's testimony referred to an entirely different shipment of flour and that the flour which was sold Ginsburg was the flour which came on the "Pleiades," which arrived at Port Arthur on February 7th, 1904. It is true that Davidson was pretty positive in his testimony that he was referring to the flour that arrived on the 7th of February, whether by the "Hyades" or the "Pleiades" he was not positive. The fact is the "Pleiades" did arrive on the 7th of February with a shipment of flour; but the evidence also shows that Davidson was selling for Clarkson to Ginsburg a very large quantity of flour, and the testimony of Short shows that only 1,500 to 2,000 sacks of flour were unloaded from the "Pleiades" after her arrival on the 7th of February, and that he himself left on the "Pleiades" when she departed from Port Arthur. The jury

were evidently justified in reaching the conclusion that Davidson was mistaken as to the date of the arrival of the flour he claimed to have sold Ginsburg.

It was very strenuously contended before the jury that Davidson's testimony had no reference whatever to the "Hyades" flour but the jury simply reconciled Davidson's testimony with that of Short. And Davidson's testimony could not have referred to any flour shipped by the "Pleiades," because only a small quantity of flour was ever unloaded from the "Pleiades;" and it seems to us that any reasonable man could only reach the conclusion that Davidson was mistaken in his testimony as to the date of the arrival of the flour covered by the draft in question. However, any discrepancy in the testimony is a matter entirely for the jury to pass upon.

Again, Davidson further testified (Rec., p. 189) as follows: "Q. What was the quantity of flour shipped by this steamer to Clarkson & Company from the Centennial Mill Company? A. Between 35,000 and 40,000 sacks."

This conclusively establishes the fact, just as the jury must have found, that Davidson's testimony referred to the shipment of between 35,000 and 40,-

000 sacks of flour made by the Centennial Mill Company, which was the only shipment of that size at or near the time about which he was testifying, and this shipment was on the "Hyades." And we think the jury were clearly right in reaching the conclusion that Davidson was merely mistaken as to the date of the arrival of the flour, the event having occurred several years prior to the time of his testimony.

Again, on page 29 of the petition, a portion of Davidson's testimony is quoted as follows:

"Q. Was any of the flour you attempted to sell to Ginsburg & Company part of the 'Hyades' flour?
A. The flour I sold to Ginsburg & Company formed a part of a shipment that arrived in Port Arthur on or about the 8th of February."

Yet he gave, as we have seen above, the quantity of flour that arrived, and the quantity conforms to the shipment that arrived by the "Hyades."

Counsel further contend that the Ginsburg transaction has nothing to do with this case. We do not agree with counsel in this contention. The proceeds of the flour sold to Ginsburg, to the extent of about 42,000 roubles, were received by the defendant bank, not on account of the payment of the "Hyades" draft, but in payment of the two drafts for

$4,136 and $16,155 above referred to; and it is important also in clearly demonstrating that the letter of hypothecation was acted upon by Clarkson & Company and the flour covered by such letter was actually sold in pursuance of such letter, which effectuated a complete conversion of the flour by the bank, even under counsels' own contention. And the flour was sold to Ginsburg with the assistance of the plaintiff bank and the effect of the transaction was that the Russo-Chinese Bank, with full knowledge, used the proceeds of the sale of the flour to Ginsburg to pay its own obligation to the National Bank of Commerce growing out of the two drafts for $4,136 and $16,155 respectively, and it conclusively appears that all of the "Hyades" flour was sold, and that all of the proceeds from its sale went into the Russo-Chinese Bank.

On page 37 of the petition an attempt is made to show that the 126,928 roubles paid by Clarkson & Company were in no part the proceeds of the sale of the "Hyades" flour. Counsel say that 79,000 roubles were paid by the bank to Clarkson & Company in Vladivostock, and that this would only leave in controversy 47,928 roubles. It was the contention of the defendant, among other things, in its answer,

that the Port Arthur Bank collected from Clarkson & Company the proceeds of the sale of the "Hyades" flour and applied it to the payment of the indebtedness of Clarkson & Company to itself.

The evidence of Mr. Short (Rec., pp. 151-152) shows that from the 1st of January, 1904, up to November 23, 1904, there had been deposited with the Russo-Chinese Bank at Port Arthur by Clarkson & Company 126,928 roubles. Of this amount 79,000 roubles, he testified, were transferred to Clarkson & Company at Vladivostock. But the evidence of Mr. Clarkson shows that he was indebted in a very large sum of money to the Russo-Chinese Bank, both at Port Arthur and at Vladivostock, and while the books of the bank at Port Arthur show that the money was transferred to Vladivostock for the account of Clarkson this does not seem important, because if it was transferred to the account of Clarkson at Vladivostock, the Vladivostock Bank, to which Clarkson was indebted, would receive the money and credit it upon what Clarkson owed, and the Russo-Chinese Bank at Port Arthur did therefore receive from Clarkson & Company, between the dates above mentioned, the full sum of 126,928 roubles and between the 25th of March and the 26th of June, 1904,

79,000 roubles were collected from Clarkson & Company and transferred to Vladivostock, undoubtedly to reduce Clarkson's indebtedness to the Vladivostock Branch.

To show the materiality of these collections we shall refer again briefly to the testimony of Short. He stated that at the time of the arrival of the "Hyades" flour there was only six or eight thousand sacks of flour in the Clarkson warehouse at Port Arthur, and other goods of the value of not exceeding 15,000 roubles. The value of the flour on hand upon the arrival of the "Hyades" at 2.50 roubles per sack would amount to about 15,000 roubles more. This, Short testified, was all the merchandise that Clarkson had on hand. When to this is added the amount of money collected from Ginsburg and the money taken by Davidson before the bank took hold of the Ginsburg matter and we have substantially a sum equal to the amount of money collected by the bank from Clarkson & Company between the dates mentioned by Mr. Short, and in order to produce this sum it is necessary to include the proceeds of the sale of the "Hyades" flour, which in itself was sufficient to warrant the jury in finding that the bank had received enough money from the proceeds of the

sale of the "Hyades" flour to have paid the draft in controversy in full.

Counsel on page 41 of the petition refer to the fact that this is an action upon an express contract. This is entirely different from the contention made by counsel upon the first trial of this case. There it was contended that it was not an action upon an express contract but was an action for money paid under mistake of fact; and this Court by deciding that it was an action for the recovery of money paid under mistake of fact established the law of the case, and counsel cannot now be heard to make the contention that it is an action upon an express contract.

But we contend that the plaintiff cannot recover either upon an express contract or for money paid under mistake of fact, and we refer to our former brief (page 25 and subsequent pages). We might say, however, that the jury were justified, even if it be treated as an action upon an express contract, in finding that the plainiff had failed to make out its case, because it did not comply with the contract. It is true that the witness for the plaintiff testified that the original draft was mailed to the Seattle bank immediately after its protest, but the officers of the Seattle bank testified that they had never received

it, and the jury may have disbelieved the testimony of plaintiff's witness as to the mailing of this draft.

We might also add that if Short's testimony is true as to the giving of the letter of hypothecation the plaintiff cannot recover because the bank, by directing Clarkson, as the agent of the Steamship Company to deliver the flour to Clarkson, the merchant, certainly relieved the Steamship Company from any and all liability to the Seattle Bank for the delivery of the flour without the production of the documents. The Russo-Chinese Bank was the holder of the legal title to the documents and of the flour, and its direction to the Steamship Company to release the flour would certainly absolve the Steamship Company from liability to the Seattle Bank for the delivery of the flour without the production of the documents. The Russo-Chinese Bank was the holder of the legal title to the documents and of the flour, and its direction to the Steamship Company to release the flour would certainly absolve the Steamship Company from liability and would forever prevent the Seattle bank from recovering anything from the Steamship Company.

On page 42 of the petition the statement is made that no custom or usage could afford a presumption

that a party would violate his contract, and the contention is also made that for the bank to direct the delivery of the flour without the production of the bills of lading was an illegal and criminal action, and alleges that Short made the statement that it was a criminal act. What Short testified to was that it would be a criminal act for himself or Davidson, as managers of Clarkson & Company at Port Arthur to sell the flour covered by the bills of lading without the production of the bills of lading, or without procuring the consent of the bank. No statement was made by Mr. Short, or anyone else, that the Russo-Chinese Bank, the holder of the legal title to the bills of lading and the draft would be committing a criminal act in directing the Steamship Company to turn the flour over to Clarkson & Company, and the Steamship Company was fully protected in obeying the direction or the order of the holder of the bills of lading.

But assuming that counsel were correct in this argument that it would be a criminal act for the bank to direct the Steamship Company to turn over the flour to Clarkson & Company before the payment of the draft,—it would seem that this is an argument in favor of the defendant. It would hardly be

presumed that the bank would direct the Steamship Company to surrender goods without the production of the documents, unless the bank construed its letter of hypothecation as a payment of the draft.

The evidence clearly shows the existence of a custom in regard to the handling of drafts such as the one in question in the manner testified to by Mr. Short. Such custom certainly would not be legal upon the assumption that the bank treated and considered the letter of hypothecation as a payment of the draft.

On page 45 of the petition and subsequent pages, counsel again discuss certain instructions given by the trial court. The instructions complained of are as follows:

"1. As the agent for the owner it was obligated to account for the amount of the draft, to account for the security which the bill of lading constituted, and it cannot be excused from obligation to account by saying that the flour disappeared without its knowledge, and require the defendant in this case in order to fasten an obligation upon it, to prove that it was negligent.

"2. By virtue of these endorsements and transfers, the legal title to the draft and the documents and to the flour in question passed to and became vested in the Russo-Chinese Bank, and I instruct you that as a matter of law it was in the power of the

plaintiff to handle, control, sell and dispose of such flour in any way that was deemed expedient by the plaintiff.

"3. If you find from the evidence in this case that plaintiff permitted Clarkson Company to take over the flour under such an arrangement as the defendant claims with the stipulation that the plaintiff was the owner of the flour and with the agreement that Clarkson & Company would account to the plaintiff for the proceeds of the sale of the flour, then I instruct you that such action on the part of the plaintiff constitues in law a payment of the draft in question and the plaintiff cannot recover and your vetrdict must be for the defendant."

We discussed the first of these instructions in our original brief at pages 41 and 42, to which we refer, and we also refer to page 34 of said brief in this connection. We also refer to our supplemental brief, pages 2 to 5, and particularly refer to pages 11 to 24 of our original brief, as bearing upon these instructions and also refer to the authorities cited in said brief. We think, moreover, that the instructions were not erroneous and correctly stated the law. There can be no question but that the legal title to the documents, the draft and the flour was vested in the Russo-Chinese Bank; to all the world, except the defendant, it was the legal owner of the flour and the documents. Neither can it be successfully

urged that an agent who has security can allow the security to disappear without accounting for it in some way. This seems to us to be elementary. But counsel says that: "This could mean nothing other than that the plaintiff was required to produce either the money or the flour. It could not avoid liability, as the jury were told, by simply proving or showing that it had not possession of the flour and did not know where it was. Apparently, under these instructions, if this flour had been lost en route and never reached Port Arthur, still the Port Arthur bank would be liable."

We do not think the instruction of the Court is susceptible of any such interpretation. The evidence shows that the flour had arrived at Port Arthur; that the documents had arrived; that the bank had instructed the Steamship Company's agent to turn the flour over to Clarkson and had taken from Clarkson a letter of hypothecation, by which Clarkson agreed to sell the flour and account to the bank for the proceeds of the sale thereof, and the Court correctly advised the jury that the burden was upon the plaintiff to account for the flour under such conditions, if the jury found such conditions to exist; and we think that the Court was justified

under the evidence in instructing the jury that the taking of the letter of hypothecation and the delivery of the flour to Clarkson by directing the agent of the Steamship Company to turn it over to Clarkson, did amount to a payment of the draft.

Counsel objects to these instructions apparently for the reason that in a case of conversion of personal property it is for the jury to pass upon the value of the property. In this case, the uncontradicted evidence was that the value of the flour was at least equal to the amount of the draft. The witnesses for the plaintiff fixed the value of the flour at such sum. There was nothing for the jury to pass upon as to the value. It was admitted. The authorities which we cited in our former brief and heretofore referred to clearly show that these instructions correctly stated the law, and in view of the evidence as to the value of the flour, which was uncontradicted, we are unable to see how the plaintiff could have been injured or benefitted by the instructions, even though the jury had been called upon to pass upon the value of the flour.

Counsel say that if the instructions had been to the effect that the Russo-Chinese Bank would have been liable for the conversion to the extent of

the value of the flour, their objection would be untenable. Yet that is precisely the situation. There was no dispute in the evidence as to the value of the flour being in excess of the amount of the draft, and the defendent was asserting no claim to anything in excess of the value of the flour.

Counsel say that the plaintiff bank had the right to have the jury pass upon the extent of its liability and that the Court could not say as a matter of law that it was the face of the draft.

We have shown that the evidence was complete both as to the giving of the permission to Clarkson to sell the flour and the fact that Clarkson sold the flour under such permission. How has the plaintiff been injured by the instruction? Had the Court modified the instruction so as to require the jury to pass upon the value of the flour, there could have been no other result than that at which the jury arrived. It was perfectly manifest and palpable that the value of the flour was undisputed and was fixed by all of the witnesses at at least the amount of the draft. We think the instruction as given by the Court correctly stated the law, but even if it did not, the plaintiff has in no wise been prejudiced.

The Court had the right to have stated to the jury that the value of the flour was not disputed; that it was fixed, and upon the undisputed testimony showed that it was of the value, as we have stated. Moreover, the bank, by taking Clarkson's obligation to pay the amount of the draft out of the proceeds of the sale of the flour, itself fixed the value of the flour, because the evidence is that Clarkson agreed to pay the amount of the draft and to sell the flour and apply the proceeds of its sale to the payment of the draft.

On page 52 of the petition Counsel insist that, because the draft was accepted by Clarkson & Company, who then became the principal debtors, it was the duty of the bank to first sue Clarkson to recover from him if possible.

The evidence shows that Clarkson was heavily indebted to the bank itself and it is a fair inference that the defendant could not have recovered anything from Clarkson had it brought a suit upon the acceptance. But it would be monstrous, it seems to us, to impose any such duty upon the defendant bank and to require it to first sue Clarkson for the recovery of this money. The method of dealing with Clarkson by the defendant bank clearly shows that it

placed no reliance upon Clarkson's financial responsibility; it relied solely upon its security; it sent the draft with the bills of lading attached with directions not to deliver them except upon payment.

Now it appears that the Russo-Chinese Bank disregarded these instructions, and while it may not have surrendered the documents to the Steamship Company, it did what was equivalent thereto—it directed the agent of the Steamship Company to deliver the flour to Clarkson & Company. In other words, the Russo-Chinese Bank undertook to do by indirection that which the National Bank of Commerce had directed it under no circumstances to do. The defendant bank sought to hold its security for the payment of its draft, and sought to prevent the flour from passing into the hands of Clarkson & Company without the payment of the draft, and the Russo-Chinese Bank, in utter disregard of these instructions, if the testimony of Short is to be believed, and the jury evidently believed it, deliberately turned over the flour to Clarkson & Company and accepted Clarkson & Company's obligation to pay the draft. Upon what principle of law or of morals ought the defendant bank be required to proceed against Clarkson upon the acceptance.

We think that this contention of Counsel cannot be sustained for a further reason: When Clarkson accepted the draft, the Russo-Chinese Bank was the legal holder of it. By taking the letter of hypothecation from Clarkson it created a new obligation on the part of Clarkson to the Russo-Chinese Bank inconsistent with the acceptance of the draft in which the defendant bank was interested. As between Clarkson and the Russo-Chinese Bank Clarkson had the right to deal with said bank as the legal owner and holder of the draft and the security. This he did, and gave a new obligation to the Russo-Chinese Bank, agreeing to pay that bank the amount of the draft, and to sell the flour and account to the bank for the proceeds of its sale, to be applied upon the indebtedness created between Clarkson and the Russo-Chinese Bank. This procedure is clearly inconsistent with the acceptance of the draft and was in the nature of a novation, a new contract between Clarkson and the bank which nullified and superseded the contract made by his acceptance of the draft.

On page 53 of the petition counsel say that the loss of the flour to the defendant was a necessary element in the appropriation of the flour by the

Russo-Chinese Bank to its own use, or a necessary element in the conversion of the flour, and that there was no evidence of any acting on the part of Clarkson under the authority of the letter of hypothecation.

We think the evidence clearly shows what became of the flour and that the defendant never received any of it. Neither this Court, nor the jury, can nor could reach any other conclusion than that the great bulk of this flour was sold to Ginsburg and that the flour had been lost to the defendant, and that its value at least equaled the amount of the draft.

On page 56 and subsequent pages counsel object to the admission of certain testimony as to the custom of the bank in handling drafts, and stated that the question ought to have been limited to cases where the character of the draft was stated and the nature of the instructions accompanying it were also stated. There was nothing erroneous in the admission of such testimony. The question was broad enough to include the method of handling drafts generally as well as the handling of drafts such as counsel suggest, and the plaintiff had ample opportunity, which it utilized, to cross-examine the

witness Davidson as to just what he meant. The evidence was properly admissable. The weight and effect of it, however, was for the jury to pass upon.

We do not think there is any merit in the contention of counsel as to the admission of the testimony.

There is another matter, however, to which we wish to call the Court's attention. Counsel contend that there is no evidence that the draft in question had been paid, but we feel confident that this Court will take the same view of the matter that it did upon the former hearing, and will find that there is an absence of evidence showing actual payment. However, if the fact of payment should not be established to the satisfaction of this Court, still the evidence clearly shows that the plaintiff was in no wise injured. Viewing this action either as one upon an express contract, or one for the recovery of money paid under a mistake of fact, the burden of proof rests upon the plaintiff to show that the draft was not paid by Clarkson & Company to the Russo-Chinese Bank—the burden is upon the plaintiff to prove a negative. It must establish the fact of non-payment before it has any right to recover,

and it was within the province of the jury to have disbelieved the testimony of the plaintiff's witness as to the non-payment, even though such evidence was uncontradicted.

But, as we have shown, both in this brief and in our former briefs, an abundance of evidence was introduced tending to show the payment of the draft, from which the jury were fully justified in reaching the conclusion that it had been paid, just as this Court announced in its former decision.

Respectfully submitted,

KERR & McCORD,

Attorneys for Defendant in Error.

No. 2182

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

RUSSO-CHINESE BANK
(a corporation),
Plaintiff in Error,
vs.
THE NATIONAL BANK OF COMMERCE OF SEATTLE, WASHINGTON,
Defendant in Error.

REPLY BRIEF OF PLAINTIFF IN ERROR ON REHEARING.

By permission of the court granted at the hearing we file a reply to the brief of the defendant in error filed at the time of the argument and which we had had no opportunity of examining prior to the argument.

I.

THE INSTRUCTION (Record p. 228) THAT PERMISSION OF PLAINTIFF GIVEN CLARKSON TO TAKE OVER THE FLOUR UNDER THE ARRANGEMENTS STIPULATED CONSTITUTED IN LAW A PAYMENT OF THE DRAFT IS ERRONEOUS.

In the petition for rehearing (pp. 47-56) we urged three considerations as showing error in this

instruction. It was urged that the trial court had quite failed to distinguish between the obligation to pay and the flour given as security for that obligation; that it was of no importance to the Seattle Bank that the security disappeared if they were, nevertheless, able to realize upon the debt; it, of course, being borne in mind that Clarkson had accepted this draft, and that the bills of lading were accompanied by a bill of sale to Clarkson and Company.

In support of this instruction counsel for defendant in error at the argument and in his brief has urged (brief, p. 26) that

> "The uncontradicted evidence was that the value of the flour was at least equal to the amount of the draft. The witnesses for the plaintiff fixed the value of the flour at such sum. There was nothing for the jury to pass upon as to the value. It was admitted. The authorities which we cited in our former brief and heretofore referred to clearly show that this instruction correctly stated the law, and in view of the evidence as to the value of the flour, which was uncontradicted, we are unable to see how the plaintiff could have been injured or benefited by the instructions even though the jury had been called upon to pass upon the value of the flour."

It will be observed, therefore, that the only support which counsel has attempted to give to this instruction is that there was no dispute as to the value of the flour, and, therefore, that it was not necessary to submit the question of this value to the jury.

Were there no conflicting evidence upon the subject, still the question whether the value of the security lost, equaled or exceeded the face amount of the draft with interest was a question of fact which the plaintiff was entitled to have the jury pass upon.

In another portion of his brief, counsel has strongly urged that this court may not now consider the evidence at all, for the reason that the jury may have refused to follow it entirely and that the jury is not bound even by the unanimous statements of all the witnesses (brief, p. 33). If this reasoning be correct, then, although there were no testimony on the subject of value, or all that testimony were unanimous, still it was a question for the jury because they had the option of rejecting such testimony *in toto* if they saw fit.

But the evidence upon the subject is not free from contradiction.

Although, as noted, it is claimed by counsel that the witnesses for the *plaintiff* fixed the value of the flour, we have been unable to find in the record any evidence in behalf of plaintiff which refers to this subject, except the testimony of the witness Friedberg as follows (Record, p. 36):

> "As far as I know during the siege of Port Arthur the price of flour was a little higher than before the outbreak of the war, but there was a lot of flour in the go-downs of the government, and no scarcity was felt of it. *I do not know the price of the flour.*"

On behalf of defendant we find only the following evidence:

Defendant's witness Short testified on direct examination (p. 152):

> "Q. And do you know the market price of flour at the time you left there?
> "A. It was selling from two forty to two sixty-five roubles.
> "Q. A sack?
> "A. A sack."

Defendant's witness Davidson testified on cross-examination (pp. 201-202):

> "Q. And was not the market price of flour in Port Arthur at that time from 2.5 to 3. roubles per sack?
> "A. There was no market price of flour at that time. The Russians were too busy saving their skins to think of establishing a definite price for edibles as is usual in cases of besieged ports."

and on pages 196-197:

> " * * * I left Chinwantau after having made arrangements with the Chinese Engineering & Mining Company to supply the fifty thousand tons of coal at eleven o'clock P. M. on the 8th of February, 1904. I arrived off of Port Arthur the following morning about ten o'clock. I was on a Russian steamer named 'Ninguta' which was denied admission and denied entrance into the inner harbor. The result of which was I was compelled to remain on board this steamer which was anchored between the Russian and Japanese fleets while the latter bombarded the former for about one hour. Some time after this the 'Ninguta' was allowed to enter, but I was denied permission to go ashore. On my arrival on the shore between four and five o'clock in the afternoon I was informed that Mr. Czechowitz left for Vladivostok by the

first train after the bombardment began with the Russian bookkeeper who had taken Mr. Short's place. The only other office man was a youngster by the name of Newhard and owing to his youth and utter incapacity and the fact that he was then in jail he was unable to render any assistance to me. From what I have since learned it would appear that Clarkson addressed a letter to me on the 30th of January, 1904, which letter he sent to Mr. Czechowitz at Port Arthur and which letter arrived during my absence in Tientsin. This letter notified me that Mr. Clarkson had made Mr. Czechowitz sole manager of the Port Arthur office and asked me to turn over all of the company's business to Mr. Czechowitz and agreed to pay me one month's salary after seven years' work. Mr. Czechowitz, however, it appears was too much concerned with his own safety to remain in Port Arthur to hand this letter over to me, and I not knowing of its existence undertook and did my best to protect the interests of the firm of Clarkson & Company during the eight trying days thereafter that I remained in that besieged port. Ultimately being compelled to leave I arrived in Shanghai about the 28th of February, 1904, and on the 29th of the same month, the next day after my arrival, was presented by Mr. A. C. Hunter of Shanghai with the letter from Clarkson dated the 30th of January, 1904. The original of this letter I have now shown the commissioner and ask that it be attached to and made a part of my deposition and marked exhibit A. It is dated 'Jan. 17/30/1904' ".

And also pages 198-199:

"A. All I know about this shipment is that a steamer belonging to either the Boston Steamship Company or the Boston Towboat Company and called either the 'Hyades' or the 'Pleiades' arrived at Port Arthur on or about the 8th of

February, 1904, and while I was manager of the firm of Clarkson & Company at Port Arthur. Just when the steamer referred to arrived I am unable to give the precise date, as I was away from Port Arthur on her arrival. On my return to Port Arthur on the afternoon of the 9th of February, 1904, I saw the steamer in the harbor. I arrived after a bombardment by the Japanese fleet and after a considerable delay was able to go on shore, and when I arrived at the office of Clarkson & Company I was told that it was impossible to obtain coolies to continue the discharge of the steamer's cargo. It was too late then on that day to do anything other than to make some effort to protect that part of the cargo which had already been discharged. On the 10th of February, 1904, the captain through the first officer demanded of me as manager of the firm, Clarkson & Company, who were the agents of the steamer, that the steamer be allowed to leave the port, and I thereupon solicited the assistance of one of the managers of the Russo-Chinese Bank to accompany me to the admiral who acted as commander of the port to endeavor to arrange with him to give permission to allow the steamer to proceed on her voyage. The commander of the port asked me what cargo she had and I told him that it was impossible for me to say what part of her cargo had been discharged and what part to be discharged in as much as some of the lighters had undoubtedly been sunk by the Japanese shells and that a good deal of the cargo had unquestionably been stolen by his own sailors and the Russian soldiers and Chinese. After a good deal of talk he promised me that he would send a sufficient number of sailors on board of the steamer the following day to discharge the rest of the cargo destined for Port Arthur, after which he would give permission for the steamer to leave the port. On the following day a cer-

tain number of sailors were sent on board of the steamer and a certain part of the remainder of the cargo was discharged. What part of it is impossible for me to say, and then the steamer was allowed to leave, which she did, for Chefoo."

And also at pages 190-191:

"Q. What did you do upon arrival at Port Arthur in reference to this shipment of flour?

* * * * * *

"A. I was allowed to go on shore at Port Arthur between four and five o'clock in the afternoon of the 9th of February, 1904, and immediately upon my arrival on shore I went to the office of Clarkson & Company and there discovered that the most of my assistants were hiding in their homes and some of them had already ran away to Vladivostok. I was besieged by people who were anxious to get passage away from Port Arthur by the steamers for which Clarkson & Company acted as agents, and as soon as I had pacified them and told them there was no possibility of any steamer leaving Port Arthur I looked for the compradore and after a certain time, possibly an hour or more, succeeded in finding him and I then tried to make arrangements with the military and naval authorities to supply watchmen to guard the cargo as all of the employes of Clarkson & Company were absolutely worthless for that purpose. Neither the navy or any army departments would give me any assistance. I finally found two Russian civilians whom I engaged for that purpose. I want to state right here that I saw with my own eyes that afternoon a very considerable quantity of flour being stolen which it was impossible for me to prevent. The whole town was in a chaotic state and the people were, more particularly the Chinese, looting everything in sight."

The time to which Davidson refers was either February 8th or 9th, only three or four days after the time that Short left Clarkson's employment.

So far, then, as there being no conflict in the evidence as to the market value of flour in Port Arthur at the time in question, it clearly appears from the testimony of the two witnesses for the defendant that there was, to say the least, a direct conflict on the subject; Short fixing the value at a certain definite sum; and Davidson saying that it had no market value whatever, and stating pretty conclusive facts to substantiate his assertion.

It is to place the evidence in the most favorable light for the defendant to say that there is a conflict in the subject. There being such conflict it was not for the court to say that the value of the flour at the time equaled or exceeded the amount of the draft.

In urging the obvious incorrectness of this instruction we again refer to the fact that the exception taken to it specifically pointed out this alleged error (Exc. 7, p. 233).

The instruction to which the attention of the court is now directed (Record, p. 228) if erroneous must necessitate a reversal of the judgment, notwithstanding the special verdict, because it is directly concerned with the special verdict and doubtless was the authority under which the jury believed they were entitled to act when they reached their conclusion. By it the mere making of the arrangement referred to was said to "constitute in law a payment

of the draft in question". It mattered not that the arrangement was consummated or how much flour was sold by Clarkson. The *permission* given by plaintiff to Clarkson to take over the flour with the agreement on Clarkson's part to account to the plaintiff for the proceeds was definitely said to be a payment of the draft.

It is submitted that no satisfactory answer has been made by counsel either in his brief or his argument to this assignment of error.

II.

A NOVATION WAS NEITHER ATTEMPTED NOR CONSUMMATED.

Throughout counsel's argument and brief there runs the suggestion that by this alleged unauthorized permission given Clarkson a novation was effected by which a new obligation was substituted for an existing one, and the Port Arthur branch substituted as the creditor of Clarkson in place of the Seattle Bank. It is indeed necessary to go to this extent to support the instruction of the court discussed in the preceding subdivision of this brief, and to establish not only that a new debt was created, but that the old one was extinguished.

The simple facts effectually prevent such a conclusion.

We take it to be the essential of any novation that either (1) a new obligation is substituted for an old one, *with intent to extinguish the old one;* or (2) the

substitution of a new debtor in place of the old one *with intent to release the latter;* or (3) the substitution of a new creditor in place of the old one *with intent to transfer the rights of the latter to the former.*

California Civil Code, Section 1531,

which we believe states the general law upon the subject.

It is essential to a novation that the original debtor be discharged and that the substitute assume and be bound for the debt. There must concur the intervention of a new debtor accepted by the creditor for and in release of the original debtor.

American Paper Bag Co. v. Van Nortwick, 52 Fed. 752;

Jackson Iron Co. v. Negaunee Concentrating Co., 65 Fed. 298;

Illinois Car etc. Co. v. Linstroth Wagon Co., 112 Fed. 737.

There obviously was here no intent upon the part of any one to extinguish the old obligation of Clarkson, or to substitute a new debtor in place of Clarkson, or to make the Russo-Chinese Bank the creditor in place of the Seattle Bank. If such had been the intent of the parties then the principal obligation, to wit, the accepted draft of Clarkson would have been cancelled and returned to him with the assent of both the Russo-Chinese Bank and the Seattle Bank. But, instead of this being done, the opposite course was taken. Short testifies that the arrangement was made at the time that he accepted the

draft, viz., January 30, 1904 (Record pp. 140 and 20). It was not the intention to then extinguish the old obligation, or Short would not have accepted the draft, but on the contrary would have demanded that it be delivered to him cancelled.

When the draft matured, it was protested for non-payment and subsequently remailed to Seattle. Of course, if the parties had intended that this guaranty or new arrangement should take the place of the old debt this action would not have been taken. The retention of the draft creates a presumption which in the absence of counter-proof is conclusive to the effect that Clarkson was not released upon his original obligation, and that a new debtor was not substituted.

In a word, this alleged arrangement so frequently discussed in this case could amount to nothing more than a release of the *security* for the debt. There was not the slightest suggestion of any release, substitution or other change of the principal *obligation.* The Seattle Bank suffered no damage by the release of this flour, assuming that it was released, if Clarkson paid his draft. An action could not be maintained against the Port Arthur branch for this unauthorized act, unless the Seattle Bank could show damage thereby, and in order to show this damage it would be compelled to allege and prove that it was unable to collect the debt from Clarkson.

This question of whether or not a novation was had we think to be of signal importance in this case because it was evidently the theory of the trial judge

that a novation was effected. The instruction already referred to, that the mere acceptance of the guarantee and permission given Clarkson by the Port Arthur branch operated as a payment of the draft, i.e., extinguished the old obligation, is but another way of saying that a novation was consummated.

This difficulty is evidently foreseen by counsel for defendant in error for he attempts to show that the record discloses that Clarkson was financially unable to pay his draft. It is said in his brief (p. 28),

> "The evidence shows that Clarkson was heavily indebted to the bank itself, and it is a fair inference that the defendant could not have recovered anything from Clarkson had it brought a suit upon the acceptance."

In a direct action by the Seattle Bank against the Port Arthur branch for damages the plaintiff could not make out a case by simply showing that the draft was worthless because its acceptor had a large overdraft with the plaintiff bank.

To the contrary there is much evidence in this record that Clarkson was financially able to pay the draft, and that the Seattle Bank believed this to be so. Mr. Ostrander, a representative of the Centennial Mill Company, long in the Orient and present at Port Arthur a few days before the war broke out, testified (p. 135):

> "I knew the firm of Clarkson & Co. from the spring of 1898. The Centennial Mill Company

did business with Clarkson & Co. from that time on to the extent of several hundred thousand dollars a year, all in flour. Shipments were made to Vladivostok, Port Arthur and Dalny. Dalny is about forty miles east of Port Arthur. Clarkson had a warehouse system in each place. I was in Port Arthur late in January and early in February, 1904, four or five days before the outbreak of the war. I was there on business of the Centennial Mill Company. Visited Clarkson & Co. at the time. The reputation of Clarkson & Co. commercially was first class as far as I could find out."

Short testified on direct examination for defendant (p. 149):

"Q. What was the financial reputation of Clarkson & Company's business at Port Arthur during the year 1903 and up to the outbreak of hostilities betwen Russia and Japan?

"A. Clarkson's financial standing in Port Arthur was all right. He always had sufficient money on his books and cargo in the go-downs to cover any liabilities that he might have."

and upon cross-examination (pp. 161-162):

"A. The suspicions of the Russo-Chinese Bank concerning Clarkson, I don't see why there should have been any. Clarkson was in—as far as his Port Arthur branch was concerned was in a better financial standing than it had been for a long time.

"Q. So far as you know, then, there was no reason why the Russo-Chinese Bank should not have assumed that Clarkson would pay these drafts when they became matured?

"A. Absolutely none.

"Q. So far as you know, there was no reason that the Russo-Chinese Bank should notify Seattle that there was anything unusual in this transaction, was there?

"A. Not that I know of.

"Q. And you know of no reason why any custom or usage prevailing at Port Arthur would have compelled the Russo-Chinese Bank to telegraph or write Seattle, do you?

"A. No, I don't."

Nor can support to the conclusion that a claim against Clarkson was valueless be obtained from the fact that Clarkson was indebted to the Port Arthur branch. This indebtedness was partly from the Vladivostok office and partly from the Port Arthur office, and whether or not it was any unusual indebtedness that was not fully secured in no wise appears. There is abundant testimony that Clarkson was engaged in very extensive business operations in both places, and it cannot be inferred that because at this time he happened to have an overdraft that he was insolvent. The strongest financial institutions are usually the largest borrowers.

This seems the proper place to again briefly refer to the statement in defendant's brief that because 126,928 roubles had been paid by Clarkson and Company to the bank between January 1st and November 23, 1904 (pp. 151-152), that the presumption may be legitimately indulged that a portion of this money went to pay the draft in question. But this argument fails to note the other side of the ledger showing that during the same period the bank had paid Clarkson and Company 79,000 roubles. There is nothing whatever to show that the payments by Clarkson had to do with this

draft or cargo of flour. To the contrary, there being substantial evidence that there were many other large financial transactions between the parties, there can be no presumption that this balance of 47,928 roubles was applied on this draft.

We refer again to the case of *Somervail v. Gillies,* 31 Wis. 152, fully quoted in our petition for rehearing (pp. 38-40).

We find no reference in counsel's brief to this case, or any dispute of the principle there annunciated, to wit, that the mere fact of the payment by one person to another is not even presumptive evidence of the payment of a particular debt until there is a further showing that there were no other dealings between the parties.

III.

THE ONLY CLAIM MADE THAT THIS DRAFT WAS PAID IS THE PRESUMPTION FROM PAST TRANSACTIONS. THIS PRESUMPTION HAS NO LEGITIMATE APPLICATION TO THE CHANGED CONDITIONS AT PORT ARTHUR INCIDENT TO THE WAR.

As frequently noted, there is no direct proof that any part of the "Hyades" flour was ever sold by Clarkson, or that any money was received by the Port Arthur branch therefor. The affirmative proof in this regard is entirely one of inference. It is said that because this arrangement was similar to those which had been made in the past between the same parties the presumption follows that the same

course was followed to the end and that the flour was in fact sold by Clarkson and the proceeds resulting therefrom received by the bank.

If it be remembered that the draft was not accepted until January 30th; that Short left Clarkson & Co. definitely on February 4th; and that hostilities commenced on the night of February 8th, it will be seen that there was a very brief interval of time in which this flour could have been sold and any light thrown thereon by Short.

Davidson left Port Arthur February 17th, and the conditions there are graphically shown by him in the excerpts from testimony already quoted. When, as he states, no market price of flour prevailed; when it was impossible to obtain coolies to discharge the steamer's cargo; when some of the lighters had been sunk by the Japanese shells and a good deal of the cargo stolen by the sailors and the Russian soldiers and the Chinese; when he states definitely that he himself saw a very considerable quantity of the flour being stolen which it was impossible for him to prevent, and that the whole town was in a chaotic state and people looting everything in sight—he brings before us a picture which discloses that the normal conditions of trade were emphatically not prevailing, and that it would be a forced conclusion to presume that this same flour was disposed of by Clarkson in the usual manner that had prevailed in times of peace. We urge that the defendant by its own showing has developed an impregnable defense to the ap-

plication of any presumption or inference from past dealings.

There is a presumption that a thing once proved to exist continues, but to that the important proviso must be added that it continues "as long as is usual with things of that nature". If conditions and surrounding circumstances have radically changed then the presumption of continuance no longer exists.

To assume that contracts made involving such large quantities of flour would be carried out in Port Arthur at the very time when conditions there were so chaotic would be as violent as the presumption that a contract requiring performance in the City of San Francisco within a few days succeeding the fire and earthquake of April, 1906, was then carried out simply because similar contracts had in normal times been so consummated.

IV.

THE FAILURE OF PLAINTIFF TO CALL OFSIANKIN AND TO PRODUCE THE WRITTEN AGREEMENT OF GUARANTEE.

We have referred to this matter in the petition for rehearing (pp. 16-19), and quoted from the testimony of Friedberg (Record p. 33), denying positively that the Port Arthur Bank ever received possession of the flour or sold it to Ginsburg. We also refer to Friedberg's testimony at page 40 of the Record, in which he said:

> "It (the bank) did not permit Clarkson & Co. to take possession of the flour. If they took possession of it, they did it on their own responsibility. It was not the bank's business to look after the merchandise."

and also the testimony of Drozdov (Record p. 64):

> "But it (the bank) did not concern itself with the goods mentioned in those documents. And did not deliver or permit Clarkson & Co. to take possession of it. Clarkson & Co. appropriated the flour themselves on their own risk and responsibility.
>
> "It was not the business of the bank to look after the goods and in fact, it did not know in what manner Clarkson & Co. made operations on these drafts."

There was nothing in the pleadings or record in the case which could have placed the plaintiff at the trial upon notice that Short would claim that any such agreement was made with the absent Ofsiankin. The two employees of the Port Arthur branch, who had testified, viz., Friedberg, the joint manager, and Drozdov, the bookkeeper, had both testified positively that no permission was given Clarkson to take the flour. We urge, therefore, that no significance should be attached to the failure to secure the deposition of Ofsiankin because the plaintiff had no reason to suppose that he, any more than any other employee of the bank, would be the one with whom this arrangement would be claimed to have been made.

But it is said that the deposition of Davidson, on file some time before the trial, placed plaintiff upon

notice of this fact. We have again read the deposition of Davidson and fail to find evidence of any arrangement with Ofsiankin with reference to the flour of the "Hyades".

Davidson's testimony, so far as placing the plaintiff upn notice that any such arrangement as testified to by Short would be claimed, has the contrary effect; for his statement, many times repeated, was that *the bills of lading were always delivered by the bank when the letter of guarantee was given,* and he denies that Clarkson was ever permitted to sell the flour until after the bills of lading had been delivered. The plaintiff in this case knew, of course, that the bills of lading had not been delivered, and therefore was justified in believing that the special arrangement claimed was not made in the case of the "Hyades" flour. No deduction from Davidson's deposition could have placed the plaintiff upon any notice that the testimony of Ofsiankin was necessary.

V.

THE GINSBURG TRANSACTION.

We shall not weary the court with further details on this matter, but refer to the petition for rehearing (pp. 25-36).

It is, however, reiterated by counsel that the flour sold to Ginsburg was a part of the "Hyades" cargo and not of the "Pleiades" cargo, and the testimony of Davidson (introduced by defendant) is

brushed aside with the simple statement that he was mistaken (brief p. 15). There is no possibility that Davidson could have been mistaken when he said that the flour he sold Ginsburg was a part of the shipment that arrived at Port Arthur on or about the 8th day of February, 1904 (Record p. 204). The reason that he cannot be mistaken on this subject is that Davidson was absent from Port Arthur when the "Hyades" draft was presented to Short. He returned to Port Arthur on the afternoon of the 9th of February. He states that he saw the steamer in the harbor, and this must have been the "Pleiades" because the "Hyades" had left Port Arthur on her homeward voyage on January 22, 1904 (Record p. 122).

Davidson had much intimate and detailed work to do with the cargo of the vessel that he saw in the harbor by securing protection from the Admiral and a sufficient number of sailors to discharge the cargo. He states that

> "on the following day a certain number of sailors were sent on board of the steamer and a certain part of the remainder of the cargo was discharged. What part of it is impossible for me to say, and then the steamer was allowed to leave, which she did, for Chefoo".

It was flour from this cargo, which Davidson thus so intimately identifies, that was sold to Ginsburg. As noted, Davidson does not know how much flour was landed by the "Pleiades", but it was evidently a considerable amount since out of it he

claims to have made the Ginsburg sale and some was looted.

It would seem also a sufficient answer to this Ginsburg claim that the defendant Seattle Bank did actually receive $20,291.20 out of a total of $33,838.38, and that the difference was deposited by Clarkson with instructions to apply it to his general account. After these uncontradicted facts there is no play for any presumption that the Seattle Bank suffered any loss from the Ginsburg sale.

VII.

SUMMARY.

So many briefs and arguments have been made in this case that to avoid as far as possible confusion, we beg to summarize our contentions:

1. The special verdict of the jury is not conclusive because (a) it is founded upon an erroneous instruction (Record p. 228), and (b) upon errors in the admission of testimony to the effect that the draft was paid (petition for rehearing p. 58), and (c) because there is no direct evidence whatever in this case that this draft was ever paid in whole or in part, and the agreement for the release of the security was not such payment, and (d) because under the extraordinary conditions existing at Port Arthur there can be no inference or presumption that the agreement for the sale of the flour by

Clarkson was carried out and the proceeds resulting therefrom deposited in the Port Arthur branch.

2. There were errors in the admission and rejection of testimony which were directly concerned with the evidence bearing upon the payment of the draft, and such rulings, therefore, are not cured by the special verdict because *non constat* it may have been this erroneous testimony upon which the jury based its verdict.

3. The special verdict not being conclusive the court may re-examine the instructions as to the duty of the Port Arthur branch concerning the flour, (see brief for plaintiff in error pp. 12-36) and also the evidence on custom or usage (brief pp. 37-40).

4. Under the first decision of this court in this case, plaintiff is entitled to recover either upon an express or implied contract. The conditions upon which the Seattle Bank expressly agreed to repay this money have been fully complied with, and since these were the only conditions attached plaintiff is now entitled to its money.

Respectfully submitted,

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